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Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law

Vivian Grosswald Curran¹

[L]ike children trying to catch smoke
by closing their hands, philosophers
so often see the object they would
grasp fly before them²

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My thanks to Martha Chamallas for infusing some life into my dry title; to Rob Schultz, an exceptionally fine editor at the *Cornell International Law Journal*; to the participants of the conference on *Perceptions of Europe and Perspectives on a European Order in Legal Scholarship During the Era of Fascism and National Socialism*, European University Institute, September, 2000, for their invariably helpful comments to my oral presentation of many of the ideas expressed here; and especially to the organizer, Professor Christian Joerges, for the opportunity to participate in the conference, and to be exposed to the extraordinarily interesting work that a new generation of German scholars courageously is doing in this area. A shorter version of this paper will appear in a volume to be published by Hart of the proceedings of the European University Institute conference (forthcoming 2002). Particular thanks to Professor Bernhard Großfeld for once again taking time from his overly burdened schedule to read my work, and to give me the benefit of his vast wisdom and knowledge. That he does not disagree with the views I express in these pages means a great deal to me.

I dedicate this article to Professor Bernd Rüthers. He has written that the future punishes those who remember falsely ("*Wer sich falsch erinnert, den bestraft die Zukunft*"). Bernd Rüthers, *Schwierigkeiten mit der Geschichte?*, JURISTEN ZEITUNG, Apr. 2001, at 181, 185 (4/2001) [hereinafter Rüthers, *Schwierigkeiten mit der Geschichte*]. For the period of European fascism which is the focus of this essay, Professor Rüthers has done groundbreaking, pioneering work in exposing historical falsification, and his contributions have gone far beyond the mere rectification of historical errors. Those of us who care about the accuracy of renditions of that period owe Professor Rüthers an inestimable debt of gratitude.

2. HENRI BERGSON, AN INTRODUCTION TO METAPHYSICS 55 (T.E. Hulme trans., G.P. Putnam's Sons 1912) (1903).

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I. Introduction

The appropriate judicial stance with respect to statutory interpretation, and most particularly with respect to the interpretation of the Constitution, is a matter of continuing and considerable debate in the United States.³ This is a debate with a longer history in Continental European legal scholarship, in part because the civil-law conception of law is rooted in an underlying assumption that law is writing, a text to be interpreted, whether in the form of an all-enveloping civil code or of another kind of legislative enactment.⁴ The conception of law as text gives rise to an urgent need to determine how judges should approach the text. Accordingly, an intricate body of legal theory addresses judicial interpretation of legislation in civil-law nations.⁵

In addition to this predictable interest in issues of statutory construction that the understanding of law as writing would engender as a matter of course, the question of appropriate judicial methodology became a particularly acute focus of legal scholarship and attention in both Germany and France after the Second World War. Both of those countries were faced with judiciaries that had interpreted and applied laws fundamentally incompatible with prior national concepts of law. Both countries also had experienced widespread judicial facilitation and enabling of what often has been referred to in the post-war era as evil or criminal law, participating actively in creating and maintaining, in the words of Professor Mahlmann,

3. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* (1999); MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION*, 211-47, esp. 230, n.33 and sources cited therein (2000). It is perhaps of greatest significance to this essay that in the contemporary United States debate, still at an extremely early stage when compared to its Continental European counterpart, at least one United States Supreme Court justice has indicated that only one methodological approach is valid. SCALIA, *supra*. In contrast to the sophisticated, hierarchical approach one encounters in some civil-law discourse on statutory construction, in the United States the numerous approaches discussed often are mutually contradictory, without consensus and generally lacking in theoretical attempts to effect mutual reconciliation. See ESKRIDGE, *supra*.

4. Accord H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 MOD. L. REV. 241 (1967).

5. In contrast to the immense civil-law literature on statutory construction, the issue has been of interest in the United States principally only in the last dozen years or so. ESKRIDGE ET AL., *supra* note 3, at 1.

"a perverted, barbarian legal order,"⁶ and helping to realize the reign of terror through law that raged in Germany from 1933 to 1945, and in France from 1940 to 1944.

Germans have referred to the Nazi judiciary's decisions as illustrating the path "*vom Recht zum Unrecht*."⁷ Like the French word "*droit*," "*Recht*" means both "law" and "right," and the German term has both the sense of a "right" possessed by a legal subject, and "right" as opposed to "wrong," such that the German phrase "*vom Recht zum Unrecht*" has connotations both of a path "from law to un-law," and "from right to wrong."⁸

In the post-war search to identify the culprit for the judicial betrayal of right and of law in Germany and France, judicial methodology became a target of attack in both countries. More specifically, the continental European tradition of viewing judges as essentially passive in the face of laws passed by a higher authority, and therefore as inclined towards judicial formalism or positivism, was blamed widely for the grave substantive injustice that the courts of Nazi Germany and Vichy France perpetrated through judicial decisions.⁹

The question of formalism's role, and, more largely, of judicial methodology's relation to substantive outcome and to justice, is of continuing and crucial importance in the world today, among others in the United States, which is grappling with the desirable role of judges when interpreting enacted law; and in Europe, which is in the process of developing a new legal order. This essay examines the courts of France and Germany during the fascist "Vichy" period in France, and the Nazi period in Germany, as a way of observing judicial methodology during a moment of crisis. Such moments provide opportunities to observe mechanisms that may be dormant and imperceptible at other historical periods and in other judicial systems, such as our own, but that nevertheless may be embedded within them. As Theodor Adorno put it, "[h]e who wishes to know the truth about life in its immediacy must scrutinize its estranged form."¹⁰

The French and German judicial systems traditionally have had significant differences in their methodological approaches, despite being civil-law systems with numerous fundamental similarities. French private law

6. Matthias Mahlmann, *The European Order in Fascist and Nazi Legal Thought* 2 (unpublished manuscript on file with author).

7. HUBERT SCHORN, *DER RICHTER IM DRITTEN REICH* 6 (1959). I have run across this phrase also in numerous other post-war German accounts. See, e.g., BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* 110 (1968) [hereinafter RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*] ("*Un-Recht*").

8. The French word "*droit*" shares with German the dual meaning of "law" and "right" but, in terms of "right," the French word signifies only a "right" such as is possessed by a legal subject. The word for "right" in the sense of antonym of "wrong" is a different word in French ("*raison*"). The English "right" shares with the German "*Recht*" the meaning of a right possessed by a legal subject as well as the antonym of "wrong," but does not connote the general concept of "law" that resides in the German and French terms.

9. See *infra* notes 53, 105, 212, 216, 233-42 and surrounding text.

10. THEODOR ADORNO, *MINIMA MORALIA: REFLECTIONS FROM DAMAGED LIFE* 15 (E.F.N. Jephcott trans., 1974).

courts have tended to adhere to a tradition of formalism in their interpretive processes, while German courts have enjoyed considerably more interpretive freedoms, in keeping with their self-understanding, to borrow John Dawson's phrase, as the conscience of their nation.¹¹ In the ongoing debate about whether judicial formalism or positivism was responsible for the injustice meted out by the courts of France and Germany during their fascist periods, it is my position that, *grosso modo*, the judicial injustice in the two countries was comparable, despite the differences in their respective traditional national judicial methodologies, and despite the fact that both countries' judiciaries during their fascist eras continued their nation's traditional methodological approaches. I conclude that judicial methodological approach correlated weakly with substantive outcome in France and Germany during the fascist period.

Although in my opinion the post-fascist tendency to attribute responsibility for judicial injustice to positivism was erroneous, nevertheless the post-war analytical focus on methodology's implication in substantive judicial outcome in and of itself was justified and important in terms of recognizing the dynamic of indissociable mutual influence that ties methodology to substance in law. Nothing in these pages should be interpreted as implying that the two are conceptually separable. Indeed, decontextualizing judicial methodology as though it were not part of the fabric of substantive law, and vice versa, would be a highly misleading point of departure for legal analysis.¹²

Moreover, while I conclude that judicial positivism or formalism was not a significant culprit for the courts' injustice during French or German fascism (for different reasons with respect to each of those countries), I do believe that positivism, in conjunction with more fundamental overriding causes, played, and continues to play, some role in encouraging substantive outcomes that comply with the texts of enacted law. Similarly, I believe that, in conjunction with more fundamental, overriding causes of compliance with fascist-era laws, the mere fact that there were such laws was a contributing, although not primordial, factor in popular obedience to the laws.

Furthermore, even if one agrees that contrasting national judicial approaches to formalism did not prevent substantive injustice in either fascist France or Germany, the fact that judicial anti-formalism in Germany

11. John P. Dawson, *The General Clauses, Viewed from a Distance*, 41 *RABELS ZEITSCHRIFT* 441 (1977) [hereinafter Dawson, *The General Clauses*]; see also Franz L. Neumann, *The Decay of German Democracy*, in *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 29 (William E. Scheuerman ed., 1996) (describing role of judiciary in Germany before Hitler).

12. My sense is that Habermas' analysis suffers from such a decontextualizing approach of procedure from substance in *Between Facts and Norms*, inasmuch as his belief in the potential of procedure as the solution to heterogeneity of substantive values suggests an insufficient accounting of the inevitably profound intermeshing of procedure and substance. I discuss this issue at greater length in Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 *COLUM. J. EUR. L.* 63 (2001) [hereinafter Curran, *Romantic Common Law*].

failed to prevent unjust substantive outcomes in Germany does not necessarily imply that judicial formalism in France was *not* the cause of injustice in France. In other words, from the standpoint of logic, substantive outcomes which were comparably unjust or comparably fascistic in both countries, despite contrasting judicial methodologies, could have meant that methodology did not have a causal role in substantive outcome in one system, without precluding the possibility that methodology might have had a causal role in determining substantive judicial outcome in the other system. Conversely, even if judicial methodology had been substantially the same in both legal systems, a similar methodology might have correlated differently with substantive outcome when combined with two different larger judicial contexts.

Not only are we dealing with two sets of mutually interactive variables (for both methodology and substantive outcome) in the case of France and Germany, but with two sets of variables in inextricable and intricate interplay with many others. Thus, although my suggestion is that methodology did not have a significant causal impact on substantive outcome in either system, my conclusion is only one plausible interpretation of the available evidence, not an interpretation logically necessitated by the mere combination of contrasting judicial methodologies with similarly repressive substantive judicial results.

Even any comparison of just formalism and anti-formalism in French and German judicial methodology in the context of fascism necessarily is of uncertain rigor due to innumerable relevant related events, including that the period of fascism lasted three times longer in Germany than in France. Time, for one, is a powerful influence, with effects that vary from judicial system to judicial system, and it is an influence that can work, among others, both to etch more firmly formative judicial developments within a legal system and culture, or, conversely, to facilitate ways for circumventing and subverting legal developments repugnant to the judiciary. As critical as time's role may be in the evolution and impact of judicial decision-making, its influence and degree of importance often are not easily perceptible or amenable to quantification, its interplay with other factors often defying detection.

The view that judicial positivism is not correlated strongly in a causal paradigm with the judicial propensity to countenance and implement unjust enacted laws, which I argue here, has been described as nihilistic by more than one legal scholar.¹³ I hope it is not too petty to quibble over a single word, but I do not agree that the view expressed in these pages properly can be called "nihilistic." I prefer to think of it not only as primarily

13. David Dyzenhaus now figures among them in his interesting book, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR 1-17* (1997). Among those who argue, in keeping with my view, that there is at best a low correlation between judicial methodology and substantive outcome, are Frederick Schauer and Mark Osiel. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 827 (1993); Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 LAW & SOC. INQUIRY 481, 489 (1995).

realistic in nature, but as realistic with the constructive purpose of seeking to understand the actual, rather than the desirable, state of affairs, with an ultimate view to determining if there may be ways, even if other than through the reform of judicial methodology, to increase the likelihood that judges in times of political and social crises will resist the temptation of abandoning constitutional, democratic principles and values.

II. From Contrasting Methodologies to Value Pluralism

The accusation of nihilism leveled at my perspective springs from the correct understanding by its critics that, if judicial methodology is not much related to substantive outcome, and was not responsible for the rabid injustice of courts from 1933 to 1945 in Germany, and from 1940 to 1944 in France, then the project of repairing or remedying judicial methodology also cannot be held out as a repository of hope for ensuring safety in the future, for ensuring the rendering of predictable and reliable judicial justice even in times of political crisis.

My sense has been that the prospect of such insecurity has been a cause for some legal scholars to shun the conclusion that methodology's relation to substance has been tenuous at best, and to reject that conclusion regardless of the evidence.¹⁴ Yet to dispute a position on the ground that it is nihilistic is itself a normative proposition, which neither establishes its own truth nor invalidates the substance of the rejected view. It is to engage in what Hannah Arendt called "[t]he basic fallacy, taking precedence over all specific metaphysical fallacies, [i.e.], . . . to interpret *meaning* on the model of *truth*."¹⁵

Moreover, the answer I would like to suggest in this essay is that there is reason to hope that the lessons of fascism may be instructive for the future in general, and in particular both for refining goals for the United States judiciary, and for developing the legal order of the European Union.

14. For discussion of a similar motivation for the widespread rejection of deconstruction among United States legal scholars, see Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 2, 26-27 (1994). I also would like to specify that my primary objection is to what seems to me to be a readiness to renounce logical rigor in order to avoid despair. Surely the recognition of even a depressing reality is more helpful for optimizing one's chances of constructing a viable future legal order than rejecting a vision, however coherent and logically compelled it might be, on the basis that one chooses not to face the results. On the other hand, in one of Isaiah Berlin's books, I once found the articulation of a view my father also had expressed, and with which I have sympathy - namely, that history had proven the Enlightenment *philosophes* wrong, but that leading a civilized life requires one to live as if they had been right. Such a sentiment seems justifiable precisely because it does not involve a refusal of the truth as one sees it rationally. If it is reasonable to conclude that such conduct will maximize the chances of a constructive social order, then it is rational as an implied course of action. The danger of rejecting conclusions because one deems them nihilistic, if one does not also deem them untrue, is that one may preclude important realities from entering into the cauldron of future planning.

15. HANNAH ARENDT, *THE LIFE OF THE MIND: THINKING* 15 (1978) [hereinafter ARENDT, *LIFE OF THE MIND*] (emphasis added); cf. BERGSON, *supra* note 2, at 32 ("Philosophical empiricism is born . . . of a confusion between the point of view of intuition and that of analysis.").

An examination of the evidence relating to judicial methodology leads one to conclude that our focus might better be diverted from judicial methodology, that a shift in the terrain of the debate may be more productive. In my opinion, that "elsewhere" is the battleground between pluralism and unicity; between diversity and uniformity; between the complications and inefficiencies of multivocality on many levels, and an encroaching monolingualism, temptingly sanitary, but leveling, and potentially repressive and suppressive. I hope to be able to justify this suggestion for displacing the area of future study through my focus on formalism and anti-formalism.

Indeed, it may be that one can best see why it is the question of pluralism that lies at the heart of the real challenges to the United States and European legal orders by seeing first why it is *not* the issue of formalism that is the crux of the problem. The question of formalism versus anti-formalism thus in one sense may be the wrong question to ask, but, in another sense, the right place to start, because addressing it may be the most illuminating way of obtaining direction as to how to reorient the analytical focus in order to increase its constructive potential.

This is especially so because the judicial orders in both France and Germany during their respective periods of fascism were orders permeated by unicity, by univocality, features that also challenge contemporary legal development. It is not as though the formalism or anti-formalism of the French and German judiciaries during the fascist period existed in isolation from other aspects of the judicial context. They existed as relatively uninfluential elements substantively in terms of fascistic results within societies that rejected multiplicity and difference, and whose rejection of multiplicity and difference permeated all of their institutions, extending into the entrails of their judicial systems.

When one leaves the terrain of methodology to step into that of pluralism, however, one vastly increases the inchoate nature of the elements to be analyzed, and indeed enters into that most inchoate of worlds which is the world of values. In the final analysis, the value of pluralism, and, more specifically, the value of *value pluralism*, the concept Isaiah Berlin advanced throughout his life's work as essential to liberal societies, provides the best hope for a continuous rejection of the quintessentially fascistic value of oneness, of the willed erasure of difference, multiplicity and otherness.¹⁶

16. See, e.g., ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969) [hereinafter BERLIN, *FOUR ESSAYS ON LIBERTY*]; *CONCEPTS AND CATEGORIES* (1978); *AGAINST THE CURRENT* (1979). For an excellent overview of this concept in Berlin's work, see JOHN GRAY, *ISAIAH BERLIN* (1996). (I believe that it is Professor Gray who coined the term "value pluralism.") On the other hand, Berlin did not claim a logically necessary connection between pluralism and liberalism: "Pluralism and liberalism are not the same or even overlapping concepts. There are liberal theories which are not pluralistic. I believe in both liberalism and pluralism, but they are not logically connected." R. JAHANBEGLOO, *CONVERSATIONS WITH ISAIAH BERLIN* 44 (1992), quoted in GRAY, *supra*, at 171 n.7; see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 65 (1999) (as to how the "liberties of different people [within a society] are interlinked"); *id.* at 77 (discussing the disadvantages of homogeneity in values); accord MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (John Cumming trans., Continuum 1997) (originally *Dialektik der Aufklärung*, 1944).

Much that is built into the institutional structures of the European Union militates against multiplicity, such that retaining value pluralism may be a challenge that will grow, rather than diminish, as time passes. In a different context, but also involving considerable risk, the urge to define and mandate an interpretive methodology of preference is potent in the United States today.¹⁷

On the other hand, it should be remembered that pluralism in and of itself is not a panacea, and may degenerate into strident conflict rather than ensure inclusiveness. Just as where methodology is at issue, one needs to be careful when considering unicity versus multiplicity to avoid a blanket condemnation of unicity because of its historical association with fascism.

Substantive values inevitably fluctuate with changing circumstances over time, and there can be no assured future to the values that future courts as institutions, or future judges as individuals, will hold and implement. As the American constitutional law scholar, J.M. Balkin, has shown so well, and captured so effectively with his coining of the term "ideological drift," even values which appear to be frozen into an immutable format on the surface evolve and change in political, social and economic valence with the passage of time and with the development of society, such that surface, rhetorical identity in court decisions, legislation and other legal texts, masks inexorable shifts in underlying concepts as times change.¹⁸ One might think in this context of the considerable irony that the French Civil Code, that hallmark of Republican democracy, was enacted as part of a highly authoritarian régime, by an authoritarian leader who, in the words of Jean Carbonnier, considered the code a means of continuing war.¹⁹ Henri Bergson described the tendency to resist concepts of flux as due to the fact that "immobility seems to [the mind] clearer than mobility."²⁰

The dilemma of trying to ensure for the future the values of the past was conveyed as follows by Ernst Cassirer, writing in *The Myth of the State*, published in 1946, after having experienced personally the political vicissitudes of states that had hounded him from his native Germany to Sweden, and finally to the United States.²¹ In a passage in which he reflected on Plato's political thought, he wrote that

17. See, e.g., SCALIA, *supra* note 3.

18. See J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); accord JOHN RAWLS, *POLITICAL LIBERALISM* (1993); HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]. For an account by a psychologist of widespread cognitive resistance to conceptualizing (1) reality as dynamic rather than static; and (2) contradiction as a constant, see Robert E. Nisbett et al., *Culture and Thought*, PSYCHOL. REV. (forthcoming) (manuscript on file with author).

19. Jean Carbonnier, *Le Code civil*, in 1 PIERRE NORA, *LES LIEUX DE MÉMOIRE* 1331, 1335 (1997) ("une continuation de la guerre par d'autres moyens").

20. BERGSON, *supra* note 2, at 53.

21. For the life of Ernst Cassirer, see TONI CASSIRER, *AUS MEINEM LEBEN MIT ERNST CASSIRER* (undated copy of original manuscript lists 1948 as date of author's preface; manuscript in collection of Hillman Library, University of Pittsburgh).

[t]he self-preservation of the state cannot be secured by its material prosperity nor can it be guaranteed by the maintenance of certain constitutional laws. Written constitutions or legal charters have no real binding force, if they are not the expression of a constitution that is written in the citizens' minds. Without this moral support the very strength of a state becomes its inherent danger.²²

Those elusive aspects of law had been well understood and articulated by numerous French and German legal theorists such as Jhering, Schmitt, Kantorowicz, Saleilles and Géný, predating both Cassirer's writing as well as the fascist era in Europe.²³ It seems clear that the best of solutions which one can hope to formulate for contemporary democratic legal orders will have to include and accept a large residue of amorphous elements, in accordance with Cassirer's insight, and that the struggle for the future of the United States and European legal orders by nature and definition will be a continuing struggle.

Legal theory's limited hold on practical predictions, and society's dependence on inevitably fluctuating perceptions of justice and ethics, derive in no small part from the limitation that law and legal concepts are not reducible or amenable to the precision of scientific reasoning. Arguing within the parameters of judicial methodology is tempting precisely because it would increase the degree of control over variables, to the extent that a debate about methodology can be limited by axiomatic points of departure formed by the tenets of the relevant methodological approaches and rules.²⁴ By contrast, the debate about fluctuating values eludes comparable control over terms and numbers of component parts.

22. ERNST CASSIRER, *THE MYTH OF THE STATE* 76 (1946); cf. CORNELIUS CASTORIADIS, *PHILOSOPHY, POLITICS, AUTONOMY* 173 (1991) ("There are no 'guarantees' for and of democracy other than relative and contingent ones. The least contingent of all lies in the *paideia* of the citizens, in the formation (always a social process) of individuals who have internalized both the necessity of laws and the possibility of putting the laws into question, of individuals capable of interrogation, reflectiveness, and deliberation, of individuals loving freedom and accepting responsibility."); SEN, *supra* note 16, at 9 ("The exercise of freedom is mediated by values, but the values in turn are influenced by public discussions and social interactions."); see also *id.* at 31 ("[I]ndividual conceptions of justice and propriety . . . depend on social associations - particularly on the interactive formation of public perceptions and on collaborative comprehension of problems and remedies."); NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 114 (1999) ("[I]t is both true that the laws make the institutions, and yet also true that the institutions make the laws"); Giorgio Del Vecchio, *Les Bases du droit comparé et les principes généraux du droit*, 12 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 493, 495 (1960) ("*Tous les phénomènes de la vie sociale sont connexes entre eux; et l'on ne peut comprendre pleinement un système juridique dans sa réalité historique qu'en se référant aux conditions de vie du peuple chez lequel il est né. Si ces conditions changent, le droit lui aussi doit être modifié . . .*").

23. Carl Schmitt of course not only continued to write during the fascist period, but actually was at his most productive during that time. See also HANS Kelsen, *REINE RECHTSLEHRE: MIT EINEM ANHANG: DAS PROBLEM DER GERECHTIGKEIT* (1960).

24. Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 466 (1897) ("[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind.").

Perhaps the most striking lesson that an examination of formalism and anti-formalism during the fascist era reveals is the complexity of the most vital task of analysis: namely, establishing causality, and avoiding a confusion between causal and circumstantial connection. When one links phenomena that have historical connections of simultaneity or sequentiality, one's approach is at risk of degenerating into determinism by characterizing connections as being causally linked if in fact their historical proximity is anything but that. In other words, if the historical conjunction between judicial methodology and courts' fascistic decisions was anything short of the first phenomenon's having in whole or at least in part necessitated the second, then it is a descent into a determinist mode of thought to conclude that the second was inevitable and, implicitly, that the connection from first to second necessarily will be reproducible, and therefore has predictive value for the future.²⁵ The examples of France and Germany during fascism, each with its different judicial methodology, illustrate no more than connections between judicial methodology and substantive outcome that enjoyed historical synchrony between, in each judicial system, two sets of variables of limited causal connection.²⁶

To the extent that one finds credible the thesis E.O. Wilson expresses in his recent book, *Consilience*,²⁷ a more distant future may yet hold the solution to the limitations in reasoning that plague the humanities and social sciences. Wilson emphasizes that the non-natural sciences are "hypercomplex,"²⁸ and that "[t]hey are inherently far more difficult than physics and chemistry, and as a result they, not physics and chemistry, should be called the hard sciences."²⁹ His thesis is that the social sciences can, and one day will, be amenable to the same degree of logical rigor as the natural sciences are today, including predictive value and reliability of conclusion.

According to Wilson, fields like law and what we call "legal theory" are at an extremely primitive stage from a scientific perspective, equivalent to the status the natural sciences once occupied at an earlier stage in their development:

[W]hile the social sciences are truly science, when pursued descriptively and analytically, social theory is not yet true theory. The social sciences possess the same general traits as the natural sciences in the early, natural-history or mostly descriptive period of their historical development. From a rich data base they have ordered and classified social phenomena . . . [b]ut they have not yet crafted a web of causal explanation that successfully cuts down through the levels of organization from society to mind and brain. Failing to probe this far, they lack what can be called a true scientific theory

25. For Kant's rendition of all causality as inherently deterministic, see ERNST CASSIRER, IV IMMANUEL KANTS WERKE 305 *et seq.* (1912-1918), quoted in ERNST CASSIRER, KANT'S LIFE AND THOUGHT 250 (James Haden trans., Yale University Press 1981) (1918).

26. On the analytical tendency towards "fundamental attribution error," arguably particularly prevalent in western reasoning, see Nisbett et al., *supra* note 18.

27. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* (1998).

28. *Id.* at 183.

29. *Id.*

... even though they often speak of "theory" ...³⁰

Wilson echoes Isaiah Berlin, who wrote that "very few [laws of sociology] have as yet been established, even by the least rigorous, most impressionistic of 'scientific' procedures. Indeed, the excessive belief in their existence is often one of the marks of lack of realism ..."³¹

Wilson's thesis combines a belief in overall oneness, the consilience of his title that he defines as the coherence and unification of knowledge across all disciplines: "literally, a 'jumping together' of knowledge by the linking of facts and fact-based theory across disciplines to create a common groundwork of explanation,"³² with an accommodation of the infinite vastnesses, the pluralities and the intricacies that roil legal theory. Contrary to those who see Wilson's ideas as having conservative political or social implications, I see them as promoting and validating such plurality-endorsing analytical frameworks as deconstruction and semiotics.³³

A peculiarly harmonious duality is embedded in Wilson's concept of consilience, a coherence notwithstanding multiplicity, evocative of *pointilliste* paintings that are both profusions of separate dots and colors and yet also offer a unified vision, perceptible when spectators alter their focus by increasing the space between themselves and the painting. Wilson's proposal would suggest an analogy to the European Union and to the United States of similar harmony and reconcilability between their onenesses and their pluralities. Dramatic conceptual reconfigurations may be necessary before such a reconciliation may be feasible, but the underlying tenets of consilience, if valid, would suggest a refutation of the idea that the twin goals of uniformity, on the one hand, and autonomy and particularity, on the other hand, are irreducibly incompatible.

For the foreseeable future, however, my own sense is that the European Union has goals of uniformity and diversity which are both fundamental to its mission and mutually incompatible, and that it is within this sobering

30. *Id.* at 188-89.

31. ISAIAH BERLIN, *THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY* 36 (1996); see also MORRIS R. COHEN, *Law and Scientific Method*, in *JURISPRUDENCE IN ACTION: A PLEADER'S ANTHOLOGY* 115, 118 (The Association of the Bar of the City of New York Committee on Post-Admission Legal Education ed., 1953) ("Much of what passes as social science is just exercise in technical vocabulary, or mere plausible impressionism, without any critical methods for testing data or accurately determining whether certain assumed results are really true."); GEORGE STEINER, in RAMIN JAHANBEGLOO, GEORGE STEINER: *ENTRETIENS* 148 (1992) ("Il y a un terrible abus du mot science comme du mot théorie Dans les sciences humaines, il y a des impressions et des narrations." ["There is a terrible abuse of the word science as there is of the word theory. . . . In the human sciences there are impressions and narrations."]); cf. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN EXPLAINED* 20 (Julian Pefanis et al. trans., 1992) ("It is not that theory is more objective than narrative: the historian's narrative is subject to roughly the same rules for establishing reality as the physicist's. But history as a narration has the added claim of being a science, not just fiction. Scientific theory, on the other hand, does not as a rule claim to be narrative. . . . In other words, I think we now have to distinguish between different regimes of phrases and different genres of discourse").

32. LYOTARD, *supra* note 31, at 8. For Kant's ultimately universalist perception, see CASSIRER, *supra* note 25, at 226-30.

33. Both are topics he discusses in this book of astonishing breadth.

framework that Europe must seek the directions for its developing legal order.³⁴ With respect to the United States, the temptation today to solidify and concretize a judicial approach to statutory construction bespeaks of a turn away from the insights that multiple routes to solutions may offer, and a valorization of uniformity that may challenge the courts' ability to profit from mutually inconsistent approaches that may prove desirable selectively in differing kinds of cases. The solidification of interpretive stances into a particular approach deemed superior may prove dangerous as consequences gyrate with time and social change.

These are my conclusions. I have stated them before showing how I reached them, with the idea that progressing in reverse order accords with the tendency Eugen Weber captured when he observed that "[w]e enter the future backwards."³⁵

III. Formalism and Fascism

A. France

1. French Theory and Practice

One of the difficulties of examining the extent to which a judiciary's methodology or philosophy is positivistic is the extreme difficulty of defining the term.³⁶ On one level, the French private law judicial tradition has been highly positivistic from the time of the Revolution inasmuch as the French judiciary has been the most averse among the western constitutional democracies to any overt challenging of the legislative text or to pronouncements that might be interpreted as judicial law-creation. The legal requirement that it refrain from law creation continues today to be explicit in

34. This is a principal theme of my article, *Romantic Common Law*, *supra* note 12. On the need to develop a theoretical framework to address this problem, see MAC-CORMICK, *supra* note 22, at 102.

35. EUGEN WEBER, *MY FRANCE: POLITICS, CULTURE, MYTH* 318 (1991).

36. For related difficulties that I do not analyze, including that of "competing versions of legal positivism," see Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & PHIL. 313 (1994). See also Hans Kelsen, *Legal Formalism and the Pure Theory of Law*, in *WEIMAR: A JURISPRUDENCE OF CRISIS (PHILOSOPHY, SOCIAL THEORY AND THE RULE OF LAW)* (Arthur J. Jacobson & Bernhard Schlink, eds., 2001), at 81, translated from *Juristischen Formalismus und reine Rechtslehre*, 23 JURISTISCHE WOCHENSCHRIFT 1723-1726 (1929) ("It is telling that most lawyers who rush to make the charge of formalism are at a loss when asked for a more precise definition of this characteristic. And an analysis of the exceedingly frequent use of this word in the critical literature would hardly reveal anything even approaching agreement on its meaning"); H.L.A. HART, *THE CONCEPT OF LAW*, 253-54 (1961); H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 50-51 (1983) ("Legal Positivism' . . . has come to stand for a baffling multitude of different sins."); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999) (discussing varying concepts of formalism and anti-formalism). Anthony Sebok distinguishes positivism from formalism. See ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998). Sebok also traces the often inconsistent use of the term "positivism" in American legal discourse in Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2065-67 (1995).

Article 5 of the *Code civil*.³⁷ On the other hand, French judges also have tended to indulge in unacknowledged creativity by questionable selections of the enacted law allegedly applicable to the pending case. As Professors Ghestin and Goubeaux put it in their *Traité de droit civil*, French judges create law, but they do so under the cover of statutory interpretation (“*sous le couvert de l’interprétation de la loi*”).³⁸

A challenge to the very concept of positivism and formalism during the fascist periods in both France and Germany, moreover, arises from the coexistence of mutually contradictory enacted laws. Both Germany and France experienced the enactment of a very large number of laws during their fascist eras that coexisted with a virtually untouched amalgam of enactments from before Hitler’s rise to power in Germany and Pétain’s in France.³⁹ Which laws, then, were the ones whose strict judicial application would justify a condemnation of positivism? In Germany, for instance, why were not the ever-valid pre-fascist laws prohibiting murder and requiring that assistance be given to a target for murder by anyone possessing the knowledge of premeditated murder, not evoked? Bishop von Galen of Münster, for one, did raise them with the authorities, and recounted the futility of his efforts to do so in his sermon of August 3, 1941.⁴⁰ Indeed, after the war, the courts struggled with whether defendants should be convicted for having denounced fellow citizens, in indispu-

37. “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.” CODE CIVIL, Art. 5.

38. JACQUES GHESTIN & GILLES GOUBEUX, *TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE* 318 (1977). Ghestin and Goubeaux illustrate how the French courts create law while maintaining an appearance of merely applying it, as where they take a rule of proof and interpret it as one of substance. *Id.* at 322-23, 326 (in principle, no case rule may have a “*portée générale*,” i.e., be generalized into a new norm to be applied in the future, but in practice judicially-created rules are generalized); see also Jean Boulanger, *Principes généraux du droit et droit positif*, in 1 *LE DROIT FRANÇAIS AU MILIEU DU XXE SIÈCLE: ÉTUDES OFFERTES À GEORGES RIPERT* 68 (1951) (France’s courts are known to interpret enacted law as meaning something completely different from what the legislator intended); *id.* at 63 (decrying the problem of the “false principle” [“*le faux principe*”], in which the French exegetical school fabricated principles they alleged to find in the Civil code, but which the Code did not contain); accord John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996); John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959) [hereinafter Dawson, *Specific Performance*].

39. With respect to this issue solely in Germany, see Moshe Zimmermann, *Foreword*, vii-xiii, in MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (Thomas Dunlap trans., The University of Chicago Press 1998) (1994) and RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 99.

40. For my English translation of relevant portions of his sermon, see Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France*, 50 HASTINGS L.J. 1, 37 (1998) [hereinafter Curran, *The Legalization of Racism*]. A more extensive French translation of von Galen’s sermon was published in *Documents*, in 160 *REVUE D’HISTOIRE DE LA SHOAH* 64-65. Bishop von Galen was referring to Articles 211 and 139 of the German Criminal Code, the full texts of which appear in *id.* But see B. Mendelsohn, *Les infractions commises sous le régime nazi sont-elles des “crimes” au sens du droit commun?*, 43 *REVUE DE DROIT INTERNATIONALE DES SCIENCES DIPLOMATIQUES ET POLITIQUES* 333 (1966) (emphasizing that, except for murder and assassination, national law before the end of the Second World War failed to criminalize what later would be classified under the rubric of crimes against humanity, such as deportation and human servitude).

table compliance with Nazi-enacted law, but also in clear contravention of law from the pre-Nazi era that had remained in effect at all relevant times. Both Radbruch and Hart discuss such cases.⁴¹

In France, the rights to private property had been sacrosanct at least since the 1804 enactment of the *Code civil*, and, as has been documented persuasively, were not newly endorsed even in 1804, but merely were being newly proclaimed in a code that incorporated many pre-revolutionary French legal concepts.⁴² Why then were not the long-established property rights of French citizens effective to protect the property ownership of French citizens from 1940 to 1944?⁴³

The technique the Vichy régime used in general was to maintain that the new laws did not disturb the status quo, but that some of those citizens who previously had been entitled to benefit from legal protections for the French were being removed from the circle of those who counted as truly, genuinely French. Thus, Jews became an unprotected class, but the laws that had protected them as French citizens before the war continued in place, to be applied to some, but simply not to all. Nothing fundamental in the law was portrayed as having changed; merely the quantity or number of people that were subject to them had changed.⁴⁴ That quantity might be connected by a logical imperative to quality in such an instance evidently went unnoticed or at least unremarked.⁴⁵

41. See HART, *Positivism and the Separation of Law and Morals*, *supra* note 36, at 74-78 and sources cited therein. For an overview of Radbruch's analysis of this issue, see Thomas Mertens, *Radbruch and Hart on the Grudge Informer: A Reconsideration*, *RATIO JURIS* (forthcoming), and sources cited therein.

42. See James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994); JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 450 (1994) (French Civil Code codified pre-Revolutionary legal theory with respect to private property rights, among others); Carbonnier, *supra* note 19, at 1332-33 (describing the French Civil Code as a repository of memory). Indeed, in 1805, an annotated *Code civil* was published, correlating Code articles with their pre-Revolutionary legal sources. See HENRI DARD, *CODE CIVIL DES FRANÇAIS AVEC DES NOTES INDICATIVES DES LOIS ROMAINES, COUTUMES, ORDONNANCES, ÉDITS ET DÉCLARATIONS QUI ONT RAPPORT AVEC CHAQUE ARTICLE OU CONFÉRENCE OU CODE CIVIL AVEC LES LOIS ANCIENNES* (Paris 1805).

43. Interestingly, when the initial *statut des juifs* was enacted in October, 1940, the official government press release insisted that the new law did not pose a threat either to "the physical persons" or to "the property of the Jews." The original text of the official press release is reprinted in JOSEPH BILLIG, *LE COMMISSARIAT GÉNÉRAL AUX QUESTIONS JUIVES* (1941-1944), at 32 (1955).

44. Weisberg presents as central to his thesis with respect to France that popular acceptance of the new legal régime was enabled by effecting the impression of the normalcy of new law, accomplished in part by rhetorical similarity between new and old legislation, with less perceptible but dramatic substantive novelty. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996) [hereinafter WEISBERG, *VICHY LAW*]. For a similar analysis with respect to Germany, see Zimmermann, *supra* note 39, at xi; Udo Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy*, in *THE HOLOCAUST'S GHOST: WRITINGS ON ART, POLITICS, LAW AND EDUCATION* 263-82 (F.C. DeCoste & Bernard Schwartz eds., 2000).

45. Although the principal problem was the widespread popular and professional approval for the exclusionary policies of Vichy, the failure to question the validity of distinguishing quantity from quality in itself may not have been surprising in France in a field such as law, whose discourse traditionally has been riddled by numerous binary oppositions of questionable logic. For one example, see, e.g., MICHÈLE-LAURE RASSAT, *LA*

As Professor Weisberg demonstrated in *Vichy Law and the Holocaust in France*, rhetorical continuity between post- and pre-fascist legislation aimed to reinforce the impression that nothing basic was changing.⁴⁶ On the importance of rhetoric, particularly in countries like France in which language traditionally has had an exalted role,⁴⁷ Jean Starobinski has observed that “every exceptional circumstance gives rise to an awakening of rhetoric, if only because a circumstance acquires its exceptional dimension only if language declares it to be such.”⁴⁸ Vichy legislation was couched in reassuringly familiar legal rhetoric, designed for somnolence, not awakening.

Hannah Arendt explored the importance of used, familiar, clichéd language in connection with Eichmann’s testimony during his Jerusalem trial with respect to his role in effectuating the murder of six million Jews.⁴⁹ When decades later, in her last and posthumously published book, *The Life of the Mind*, she tried to explain the much-misunderstood concept of the “banality of evil” that she had introduced in her Eichmann account to describe the apparently infinite chasm between the evils perpetrated and the defendant perpetrator, she noted the irony, and perhaps even paradox, of the fact that the word “morals comes from *mores* and ethics from *ethos*, the Latin and the Greek word for customs and habit”⁵⁰

Arendt suggested that the ordinary, commonplace language of the past does not invite thought to depart from the ordinary habits of past thought, and indeed speculated that much of the evil perpetrated by the Nazis was due to what she described as a kind of “thoughtlessness.”⁵¹ In a similar vein, where laws such as the Vichy enactments incorporate both the terms

JUSTICE EN FRANCE 6 (1996) (1985). For how recently the belief in *equality* of access to political rights entered western intellectual discourse, see SEN, *supra* note 16, at 233; BERLIN, *FOUR ESSAYS ON LIBERTY*, *supra* note 16, at xi.

46. See WEISBERG, *VICHY LAW*, *supra* note 44; RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 143-82 (1992) [hereinafter WEISBERG, *POETHICS*].

47. See GEORGE STEINER, *ERRATA: AN EXAMINED LIFE* 31 (1997) (describing the French language as “a public medium”).

48. Jean Starobinski, *La Chaire, la tribune, le barreau*, in 2 *LES LIEUX DE MÉMOIRE*, *supra* note 19, at 2009, 2011 (“dans les pays d’ancienne culture rhétorique, toute circonstance exceptionnelle suscite un réveil de la rhétorique, ne fût-ce que parce qu’une circonstance ne prend sa dimension exceptionnelle que si une parole la déclare telle”).

49. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1963) [hereinafter ARENDT, *EICHMANN*].

50. ARENDT, *LIFE OF THE MIND*, *supra* note 15, at 5. For the role of Kant’s thought in Arendt’s concept of the banality of evil, see Thomas Mertens, *Arendt’s Judgement and Eichmann’s Evil*, 2 *FINNISH YEARBOOK OF POLITICAL THOUGHT* 58 (1998). For Aristotle’s view of ethics as deriving from custom, and the legislator’s role in devising customs that encourage virtue, see Book II, chapter I of *Nicomachean Ethics*, in *INTRODUCTION TO ARISTOTLE* 331-32 (Richard McKeon ed., 1947) [hereinafter ARISTOTLE] (“[M]oral virtue comes about as a result of habit, whence also its name *ethike* is one that is formed by a slight variation from the word *ethos* (habit).”).

51. See ARENDT, *LIFE OF THE MIND*, *supra* note 15; ARENDT, *EICHMANN*, *supra* note 49; see also Yves Ternon, *La Robe brune - les juristes allemands et le national-socialisme* (1933-1936), 170 *REVUE D’HISTOIRE DE LA SHOAH* 68, 85 (2000) (attribution of Nazi persecution of Jews to “indifference” rather than “antisemitism”).

and style of previously well-established legal norms, that very attribute enhances the ease for the legal community to experience them as unremarkable, rather than as an abrupt and profound departure from prior norms.⁵²

Among the legal scholars in France of the view that positivism bears substantial responsibility for the Vichy-era court decisions, the principal proponent has been Danièle Lochak.⁵³ Lochak's analysis of the situation in France is in substantial agreement with the gist of the post-war German tendency to blame judicial positivism in Germany for the Nazi era court decisions.⁵⁴ While I disagree with Professor Lochak's assignment of culpability to judicial positivism, I agree with her view that the French judiciary was positivistic and formalistic in approach. On the other hand, French scholarly legal theory (as opposed to judicial practice) was mixed, with theorists such as François GénY having rejected traditional judicial positivism decades earlier, having taken inspiration from the German historical school, and engaging in a mutually influential relation with the German free law and sociological school theorists (Kantorowicz, Ehrlich, and Fuchs).⁵⁵

For this reason, Marie-Claire Belleau has argued against viewing French legal theory as positivistic.⁵⁶ While it is true that France had an anti-positivistic legal school of thought, for the purposes of our discussion about the judicial injustice wrought by France's courts under fascism, it is more significant to note, however, that the anti-positivists in France by and large were scholars who did not succeed in persuading the courts to follow their advice.⁵⁷ This stands in contradistinction to the very marked impact

52. For a more general and theoretical discussion of cognitive limitations on the acquisition of newness, see Peirce's concept of "trace." 1 THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 24, 30 (Nathan Houser & Christian Kloesel eds., 1992). Ricoeur also discusses trace in PAUL RICOEUR, TEMPS ET RÉCIT III: LE TEMPS RACONTÉ 177-83 (1985).

53. See Danièle Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*, in LES USAGES SOCIAUX DU DROIT (Danièle Lochak ed., 1989) [hereinafter Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*]; Danièle Lochak, *Écrire, se taire . . . Réflexions sur l'attitude de la doctrine française*, in LE DROIT ANTISEMITE DE VICHY 433, 436 (Maurice Olender ed., 1996); Danièle Lochak, *Le Juge doit-il appliquer une loi inique?*, in JUGER SOUS VICHY 29-39 (Maurice Olender ed., 1994) [hereinafter Lochak, *Le Juge doit-il appliquer une loi inique?*].

54. See Lochak, *Le Juge doit-il appliquer une loi inique?*, *supra* note 53; see also *infra* notes 233-35 and surrounding text.

55. See FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (F. Pichon et Durand-Auzias 1919) (1899) (in two volumes); *infra* notes 263-320 and surrounding text.

56. See Marie-Claire Belleau, *Les Juristes inquiets: classicisme juridique et critique du droit au début du XXe siècle en France*, 40 CAHIERS DE DROIT 507 (1999).

57. See FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 475 (4th ed. 1998); Curran, *Romantic Common Law*, *supra* note 12; see also Michel Troper et al, *Statutory Interpretation in France*, in INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil McCormick & Robert S. Summers eds., 1991) (emphasis added) (referring to a French classification of legal argument "devised by the followers of GénY" that "like 'libre-recherche' has not been followed by the courts").

on legal practice that their German theorist counterparts experienced.⁵⁸

Nor did the French maverick theorists persuade even the majority of other French legal theorists. Despite a considerable trend away from legal formalism in France, particularly since the end of the Second World War,⁵⁹ even current French legal theory reflects a continuing reluctance, and even refusal, to accept the interpretive methods Saleilles and Gény advocated.

A most illustrative recent example of this phenomenon can be seen in the portrayal of Saleilles' theory in a textbook for French law students published in 1999.⁶⁰ The author quotes from Saleilles' introduction to Gény's *Méthode d'interprétation et sources en droit privé positif* to the effect that gaps in statutory law are to be filled by judges in accordance with the spirit of the Code: "Beyond the Civil Code but by means of the Civil Code" ("Au-

58. See, e.g., RECHT UND JUSTIZ IM "DRITTEN REICH" 38, 42 (Ralf Dreier & Wolfgang Sellert eds., 1989). As early as 1924, an official proclamation of the association of judges of the Supreme Court of the German Reich ("*Kundgebung des Richtervereins beim Reichsgericht*") invoked the *Generalklauseln's* normative principles as a valid basis for judicial rejection of enacted law ("*Gesetz*"). SCHORN, *supra* note 7, at 29. Ingeborg Maus refers to a still earlier declaration by Germany's judicial association (*Richterbund*), in 1920, to the effect that Germany's judges were to display no "unnecessary bond" to enacted law ("*keine unnötige Bindung*"). Ingeborg Maus, "*Gesetzesbindung*" der Justiz und die Struktur der nationalsozialistischen Rechtsnormen, in RECHT UND JUSTIZ IM "DRITTEN REICH" 93 (Ralf Dreier & Wolfgang Sellert eds., 1989) (citing DRiZ [limited to judges adjudicating civil matters] 1920, at 85). Schorn also argues that this perspective in fact was not adopted by Germany's judges, much as I have argued in the case of France. I do not agree with Schorn's conclusions with respect to Germany, however. They have been superseded and corrected by compelling scholarship since his 1959 publication, demonstrating that, by 1933 (and substantially before then), German judges customarily considered themselves far freer and more important a factor in forming law than their French counterparts. Indeed, Schorn's work, despite the massive and truly fascinating documentation it contains of the judicial domain in the Third Reich, nevertheless remains an anti-positivistic account in the style that characterized the immediate post-war reaction in Germany. He seeks to blame positivism and exculpate Germany's judges, both through his theoretical Radbruchian position, more fully discussed below, as well as by numerous accounts of the very rare judges who offered support to their Jewish colleagues. These accounts on the one hand distort history by dwelling on heroic judges: by granting so much space in his book to conduct that represented no more than a tiny fraction of the actual judicial response, Schorn implicitly suggests that judicial courage and anti-Nazi stands were common currency. (Ingo Müller, Michael Stolleis and others have compellingly shown otherwise.) On the other hand, however, they also are fascinating and invaluable accounts of those rare people of courage who largely were unsung heroes, known only to the few they helped, and whose identities and stories would have been lost to history without Schorn. Schorn's principal message is to advocate the judiciary's considering "*Recht*" as God-given, natural-law principles of justice, and to balance its conception of "*Recht*" between the latter and the commands of the sovereign. SCHORN, *supra* note 7, at 31-32. Perhaps most damaging to his anti-positivistic argument is his silence with respect to Kantorowicz's free law school, about which more will be said later. See *infra*, notes 272-320, and surrounding text. Schorn does not engage in a discussion of the significant pre-Hitler judicial tradition of departing from enacted law. Indeed, Schorn concludes that every German judge was guiltless even when realizing "*Unrecht*" ("*injustice*" / "*un-law*" / "*wrong*"), so long as he was applying enacted law, since, in Schorn's view (as in Radbruch's), German judges considered themselves bound to do so. *Id.* at 30-31.

59. See *infra* notes 209-13 and surrounding text.

60. See PATRICK COURBE, INTRODUCTION GÉNÉRALE AU DROIT 52 (6th ed. 1999).

delà du Code civil, mais par le Code civil").⁶¹ The key point is that Professor Courbes, writing in 1999, presents Saleilles' theory as if it insisted primarily on the judicial obligation to *adhere* to the Code, on the judge's duty to fill gaps in law *by means of* the Code.⁶²

In so doing, Professor Courbes ignores Saleilles' own contrary and highly explicit explanation of his meaning. A few lines after the sentence quoted above, Saleilles clearly stated that his aim was to privilege the judicial freedom to go "*beyond* the Civil Code" rather than the judicial obligation to do so "*by means of* the Civil Code": "[T]he part which matters most to us is the '*Beyond*'" ("*ce à quoi nous tenons le plus c'est à l'Au-delà*").⁶³ Moreover, Saleilles' final words in the *Preface* were as follows: "From now on it will be difficult for that '*Beyond*' not to become the reigning word for all jurists" ("*Il sera difficile désormais que cet 'Au-delà' ne devienne pas le mot d'ordre de tous les juristes*").⁶⁴ Professor Courbe's rendition of Saleilles' theory for contemporary French law students thus inserts a positivistic view that Saleilles himself explicitly rejected.

The evidence appears compelling that while France had some theoreticians like Saleilles who agreed with the German free law school in recognizing the importance of judicial discretion as a dimension of law,⁶⁵ in France those scholars' views penetrated into mainstream legal culture principally only after the Second World War,⁶⁶ and even then continued to be diluted and limited through interpretation, as they still continue to be today.

An interesting difference between France and Germany during the fascist period was the activity of legal scholars. Generally influential in both countries, especially when compared to their common-law counterparts, legal academics' contemporaneous responses to the fascist-inspired laws were very different in France and Germany. While German legal theorists openly and profusely discussed the theoretical underpinnings of the new German legal concepts and conceptions, including extensive references justifying the rejection of Jews from national life, French legal scholars on the whole meekly accepted and indirectly endorsed the new legal order, but tended to avoid evaluative commentary on the new enactments.⁶⁷

61. R. Saleilles, *Preface*, in GÉNY, *supra* note 55, at xxv.

62. See COURBE, *supra* note 60, at 52.

63. Saleilles, *supra* note 61, at xxv (emphasis in original).

64. *Id.*

65. See, e.g., *id.*; *infra* notes 272-320 and surrounding text.

66. See *infra* notes 209-19 and surrounding text.

67. For an excellent portrayal of German legal discourse during the Third Reich, including its open and plentiful discussions of anti-Jewish animus, see BERND RÜTHERS, *ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH* (1988) [hereinafter RÜTHERS, *ENTARTETES RECHT*] and ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (E.A. Shils et al. trans., Oxford University Press 1941). Rùthers' choice of the word "*entartet*" ("degenerate") in his title to designate Nazi law echoes the abundant Nazi use of that word when describing the "non-Aryan" world. Among others, the painting and music of Jews was so designated, and Nazi Germany and occupied France went so far as to hold exhibits of such allegedly "degenerate art" ("*entartete Kunst*"). See, e.g., BRUNO MANZ, *A MIND IN PRISON: THE MEMOIR OF A SON AND*

The substance of the scholarly commentary to which the new legislation in France gave rise tended to focus on the minutiae of applying the new laws, such that legal journals developed new categories of law ("Jews;" "Jewish matters;" "Jewish issues") that discussed the literal and legally technical applications of the texts with virtually no attempts to address their philosophical import within the framework of the French legal universe.⁶⁸ Similarly, Dominique Rémy offers the following example of the rejection of substantive evaluation in the French scholarly approach to Vichy statutes. He cites a typical academic commentary that focused on the legal technicality of which source of authority should be viewed as the one giving rise to the anti-Jewish measures: the police powers or the laws governing civil status, but which did not address the legal significance of the measures themselves.⁶⁹

Such evaluative commentary as did exist tended to characterize the new laws as having a principally protective function, and were a far cry from the aggressive casting of the Jew as enemy that Carl Schmitt undertook in Nazi German legal theory in the context of his more general, pre-fascist theoretical endorsement of murdering the foe as healthy for the polity.⁷⁰ By contrast, in France substantively evaluative commentary by legal scholars was so rare that much of it did not even refer to that aspect of the new Vichy laws, let alone attempt to place it in a new theoretical legal context.⁷¹

SOLDIER OF THE THIRD REICH 85 (2000). It should be noted that the French scholarly avoidance of evaluative commentary and the French dearth of racist legal theory had its counterpart in Germany. Ingo Hueck refers to Victor Bruns and Herbert Kraus as representative of German legal scholars who chose to bury themselves in teaching or other legal endeavors that did not involve them in Nazi legal theory. See Ingo J. Hueck, "Sphere of influence and 'Völkisch' legal thought": Reinhard Höhn's Notion of Europe 3 (unpublished manuscript on file with author). The difference was, rather, that racist legal theory abounded in Germany, as it did not in France.

68. For the role of the French legal community, including both eminent law professors and members of the *Conseil d'État*, in supporting Vichy's antisemitic measures, endowing them with the appearance of legality, see Pierre Birnbaum, *Grégoire, Dreyfus, Drancy, et Copernic*, in 2 *LES LIEUX DE MÉMOIRE*, *supra* note 19, at 2679, 2705 ("le rôle très actif joué par les membres des grands corps, et en particulier ceux du Conseil d'État qui aux côtés de célèbres professeurs des facultés de droit, comme Joseph-Barthélemy, Achille Mestre, Julien Laferrière, Georges Ripert et bien d'autres, donnèrent un fondement juridique aux mesures d'exclusion et de répression des juifs") and JOSEPH-BARTHÉLEMY, MINISTRE DE LA JUSTICE: VICHY 1941-1943 (1989). Accord Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*, *supra* note 53, at 252.

69. See DOMINIQUE RÉMY, *LES LOIS DE VICHY* 20 (1992) [hereinafter *LES LOIS DE VICHY*].

70. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 33 (George Schwab trans., Rutgers University Press 1996) [hereinafter *SCHMITT, THE CONCEPT OF THE POLITICAL*]; see also Leo Strauss, *Notes on Carl Schmitt: The Concept of the Political*, in HEINRICH MEIER, CARL SCHMITT & LEO STRAUSS: *THE HIDDEN DIALOGUE* 91-97 (J. Harvey Lomax trans., The University of Chicago Press 1995) (1988). I agree with both William Scheuerman and David Dyzenhaus that Schmitt's legal thinking did not undergo a substantial change after the Nazi *Machtergreifung*. See DYZENHAUS, *supra* note 13, at 83; WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 113-16 (1999) [hereinafter *SCHEUERMAN, END OF LAW*].

71. See *LES LOIS DE VICHY*, *supra* note 69, at 20.

In the forty books of scholarly commentary that were published in France during the Vichy period, only three instances of evaluative, substantive objections to the new laws have been identified.⁷² This fact alone cannot be interpreted either as a reflection of cowardliness or of agreement on the part of France's legal academics, because censorship would have prevented publication of writings that were written, but that criticized the new system. The apparent futility of circumventing ubiquitous censorship may also have had a discouraging effect even with respect to attempting to write critically for French legal scholars who otherwise might have wanted to do so. It is not without significance that those exceptional critical publications which made it through to print appeared in 1944, at a time when Germany's defeat seemed inevitable, as well as at a time when popular sentiment throughout France had turned against collaboration, and Pétain felt it necessary to make dramatic concessions to a growing anti-collaborationist sentiment which neither he nor his government shared.⁷³

Scholarly legal commentary in France shared with the courts an approach that skirted the larger significance of the newly-enacted discriminatory laws. The rare instances of commentary by established members of the academic community reveal an attitude distinct from corresponding German utterances. In France, the tendency was to downplay the racial discrimination, and to emphasize the allegedly protective function of exclusionary laws. While German legal theorists also portrayed discriminatory laws as protective of the German *Volk*, the German rendition of the theoretical bases of the new laws included far more underscoring of the inimical nature of all Jews.⁷⁴ Thus, in his *German Legal Science at War with the Jewish Spirit*, Carl Schmitt wrote that "[w]e must free the German spirit from all Jewish falsifications/fabrications" ["*Fälschungen*"].⁷⁵ Schmitt also wrote of a "holy exorcism" of Jews,⁷⁶ on the basis of which Rüthers has observed that Schmitt was equating Jews with the devil.⁷⁷

72. Dominique Gros undertook to examine those books for the purpose of identifying the nature of legal academic response to Vichy enactments. His results are published in Dominique Gros, *Peut-on parler d'un "droit antisémite"?*, in *LE DROIT ANTISÉMITÉ DE VICHY*, *supra* note 53, at 22-25.

73. For a study devoted to French public opinion during Vichy, see PIERRE LABORIE, *L'OPINION FRANÇAISE SOUS VICHY* (1990). Serge Klarsfeld has documented the reluctance with which Pétain eventually diminished Vichy's collaboration with the Nazi occupiers once popular sentiment had reversed itself in France, all the while continuing to complain bitterly to the Germans about the Italians' circumvention of collaboration in the zone of France they controlled, a phenomenon which was making it increasingly difficult for the French government to collaborate without appearing to do so willingly. See SERGE KLARSFELD, *VICHY-AUSCHWITZ: LE RÔLE DE VICHY DANS LA SOLUTION FINALE DE LA QUESTION JUIVE EN FRANCE, 1943-1944* (1985); ROBERT O. PAXTON, *VICHY FRANCE: OLD GUARD AND NEW ORDER 1940-1944*, at 183 (1972).

74. See, e.g., CARL SCHMITT, *DIE DEUTSCHE RECHTSWISSENSCHAFT IM KAMP GEGEN DEN JÜDISCHEN GEIST* (1936). For more on Schmitt's antisemitism, see DYZENHAUS, *supra* note 13, at 98-101 and SCHEUERMAN, *END OF LAW*, *supra* note 70, at 10, 113-14, 121-28, 157-58, 164-66, 175-78.

75. SCHMITT, *supra* note 74, at 15 (1936) ("Wir müssen den deutschen Geist von allen jüdischen Fälschungen befreien").

76. See *id.* at 30.

77. See RÜTHERS, *ENTARTES RECHT*, *supra* note 67, at 138.

Indeed, in a brilliant work on totalitarian language, Jean-Pierre Faye has argued compellingly that both German fascist law and legal theory used the term "race" as synonymous with "species," rather than in the traditional meaning of "race," thus laying the ground through rhetorical device for the conceptual relegation of Jews to non-human status.⁷⁸ French fascism as manifested in Vichy legal discourse, and in such scant French legal theory as existed, did not extend that far, despite such apparent anomalies in Vichy French law as a more inclusive definition of who was Jewish than was to be found in Hitler's Nuremberg laws.⁷⁹ Consequently, for example, despite Vichy's spontaneous promulgation of discriminatory laws, and while Vichy France prohibited intermarriage, it never went so far as to follow the German model of criminalizing sexual relations between Jews and non-Jews.⁸⁰

By the same token, the following explanatory and exculpatory statements by two French law professors, both of whom were deans of French law schools, offer a dramatic contrast to the virulent antisemitism of a German legal academic such as Carl Schmitt. Georges Ripert, the dean of the Sorbonne, explained that "[i]n France, after the national Revolution ["national Revolution" was the term current at the time for Pétain's take-over], an antisemitic tendency appeared, *not motivated by racial hatred, but by the nefarious role which certain Jewish politicians and financiers had played in the Third Republic.*"⁸¹

Similarly to Ripert, another French law school dean, the dean of the Bordeaux law faculty, took pains to characterize Jewish exclusion from professional life as occurring within France's traditional legal protections, echoing the original official press release that the Vichy government had issued when it enacted the original *statut des juifs*, before the régime was satisfied that a full-scale deprivation of the legal rights of all Jews would be

78. JEAN PIERRE FAYE, *LANGAGES TOTALITAIRES* (1972). See in particular Faye's discussion of Carl Schmitt at 366-67.

79. See Curran, *The Legalization of Racism*, *supra* note 40, at 5 n.7; 27 n.77.

80. See FAYE, *supra* note 78. Ingo Müller has analyzed numerous Nazi German court cases that arose under the criminalization of copulation between Jew or "non-Aryan" ("nichtarier") and "Aryan." See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., Harvard University Press 1991) (1987).

81. GEORGES RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, t. II, 170-84 (1943) (emphasis added), *quoted in* Gros, *supra* note 72, at 16. As noted earlier, Pierre Birnbaum blames Ripert for having created an apparent legal foundation through pernicious justification. Birnbaum's criticism is much in keeping with both Lochak's and Weisberg's, who focus on the perniciousness of members of the legal community who failed to signal the antisemitic valence in the new legal order as an impermissible departure from and violation of French law. Lochak also notes that, along with Joseph Barthélémy (law professor at the University of Paris), and Roger Bonnard (dean of Bordeaux Law School), Ripert accepted a ministerial position in Pétain's government. See Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*, *supra* note 53, at 252; see also ANDRÉ KASPI, *LES JUIFS PENDANT L'OCCUPATION* 112 (1991) (quoting Ripert's instructions to subordinates to compile a list of those who were "publicly known or who to your personal knowledge must be, pursuant to the first article [of the *statut des juifs*], be considered Jews" ("de notoriété publique ou à votre connaissance personnelle, doivent être, aux termes de l'article premier, regardés comme juifs")).

palatable to the French population at large.⁸² According to the dean, the *désémitisation* or “desemitting” of France’s civil service was “a measure in the general interest and not a punishment; [and thus] compensation shall be granted to the affected [Jewish] civil servants [who lose their jobs].”⁸³

In an exchange which would have been unimaginable in Germany, France’s Rabbi Kaplan wrote to the notoriously antisemitic Commissioner on Jewish Questions of the Vichy government, Xavier Vallat, to protest Vichy measures against Jews and to remind Vallat of the devoted service to France of many French Jews. Not only did Rabbi Kaplan receive a reply, but the letter further explained Vichy’s position as not involving antisemitism as such: “[I]n the government’s attitude there is no anti-Semitism.”⁸⁴ In contrast to official Nazi vilification of Jews on an allegedly racial level, even French rhetoric often emphasized the individual level. Thus, the letter to Rabbi Kaplan continued by explaining Vichy discriminatory measures as due entirely to the conduct of both individual and foreign Jews, and as ensuing principally from the alleged fact that “during the last few years, [there was] an invasion of our territory by a host of Jews having no ties with our civilization.”⁸⁵

A compelling illustration of the difference between the French and German perspectives can be seen in the French decision to refrain from a wholesale denaturalization even of its foreign-born Jewish citizens, resisting German demands that Vichy France mandate the denaturalization of all foreign-born Jews who had acquired French citizenship. Vichy France’s citizenship law also provides a sharp and telling contrast to Nazi German measures with respect to German Jews: namely, (1) the initial stripping of citizenship status of Jews residing in Germany, reducing them to “nationals” (“*Staatsangehöriger*”), as opposed to “citizens,” (“*Reichsbürger*”), pursuant to the Nuremberg laws of September, 1935,⁸⁶ and (2) stripping German Jews residing abroad of German nationality, thus rendering all émigré German Jews stateless.⁸⁷

82. See Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*, *supra* note 53. Indeed, as time passed, Vichy laws became increasingly bold in their discriminatory measures. See, e.g., *La Loi du 2 juin 1941 remplaçant la loi du 3 octobre portant sur le statut des juifs*, JOURNAL OFFICIEL, 18 Octobre 1940, at 5323; *Décret no 1301*, prohibiting Jews from engaging in the arts. (Enacted 6 June 1942), available at <http://www.amgot.org/statut.htm>. For a selective but effectively representative presentation of the laws of Vichy, reflecting the ever-increasing boldness in discriminating against Jews, see LES LOIS DE VICHY, *supra* note 69.

83. ROGER BONNARD, *PRÉCIS DE DROIT PUBLIC* 466 (1944), quoted in Gros, *supra* note 72, at 16.

84. The letter is quoted in English translation in NORA LEVIN, *THE HOLOCAUST: THE DESTRUCTION OF EUROPEAN JEWRY 1933-1945*, at 434 (1968).

85. *Id.*

86. This was accomplished by the “Reich Citizenship Law,” the “*Reichsbürgergesetz*,” 15 September 1935, RGBl. I, at 1146. See also the related “Law for the Protection of German Blood and Honor” (“*Gesetz zu Schutze des deutschen Blutes und der deutschen Ehre*”), *id.*

87. This was effected in 1941, six years after the Nuremberg Laws, in the eleventh of sixteen decrees (“*Verordnungen*”) promulgated pursuant to the Nuremberg Laws. *Reichsbürgergesetz* of 25 November 1941.

Despite its own virulent antisemitism, Vichy France never reached the total deindividualization and dehumanization that Nazi Germany endorsed and practiced.⁸⁸ On July 22, 1940, less than two weeks after the July 10 meeting of parliament that resulted in Pétain's acquiring dictatorial powers, Vichy promulgated a law to denaturalize foreign-born citizens who had become naturalized pursuant to France's naturalization law of 10 August 1927.⁸⁹ The new Vichy law created a commission empowered to review the citizenship of each and every citizen naturalized under the law of 1927. The 1927 law was used as the benchmark because it had facilitated the citizenship acquisition process, and because it was widely believed that most of France's foreign-born Jewish citizens had been naturalized thereunder.⁹⁰ The commission was to denaturalize each person not deemed worthy of being French, a criterion which might be expected to encompass all Jews naturalized since 1927.⁹¹

While the objective of the 1940 law was to target foreign-born naturalized Jews, including, as the statute specified, those family members who had acquired French citizenship derivatively from the person directly naturalized pursuant to the 1927 law, nevertheless Vichy refused to accede to German demands in 1943 that all Jews who had been naturalized since 1927 automatically and without exception be denaturalized.⁹² Marrus and Paxton report that Laval, France's second in command under Pétain's dictatorship, responded to the Germans' demand for indiscriminate Jewish denaturalization by explaining how and why Pétain had refused: "[F]or the sake of his own conscience he wanted to examine each case individually."⁹³

88. Cf. LEVIN, *supra* note 84, at 443 ("It took the Gestapo a long time to absorb the bewildering reality that even the most collaborationist French officials—including Laval—persisted in regarding French-born Jews . . . as Frenchmen . . ."). My own view, further elaborated in Curran, *The Legalization of Racism*, *supra* note 40, lies somewhere in between Levin's view and that of Paxton, Marrus and Klarsfeld, that Vichy protection of the French-born essentially was a sham.

89. See *Loi du 22 juillet 1940*, in JOURNAL OFFICIEL, 23 juillet 1940 [hereinafter *Loi du 22 juillet*].

90. See MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* 324-25 (1995).

91. See *Loi du 22 juillet*, *supra* note 89.

92. See MARRUS & PAXTON, *supra* note 90, at 324-26; SERGE KLARSFELD, *VICHY-AUSCHWITZ: LE RÔLE DE VICHY DANS LA SOLUTION FINALE DE LA QUESTION JUIVE EN FRANCE. 1943-1944*, at 67-96 (1985).

93. MARRUS & PAXTON, *supra* note 90, at 326. It should be noted that Marrus and Paxton conclude that part of Vichy's reluctance to engage in wholesale denaturalization, if not the total motivation, was due to the worsening military situation of Germany, implying that Pétain and Laval would have reacted more compliantly earlier. Klarsfeld concurs in this conclusion. See KLARSFELD, *VICHY-AUSCHWITZ*, *supra* note 73, at 67-96. While I also am inclined to view the French popular trend away from supporting collaborationist policies and Germany's military problems as important factors in Vichy's refusal to comply with the Germans on this issue, and do not go as far as Nora Levin in assessing French antisemitism as animated entirely against foreign Jews, see *supra* note 84, I believe that Vichy's refusal to denaturalize Jews wholesale did signal a French characteristic that allows one to differentiate Vichy policies as falling short of the total dehumanization which marked the Nazi German régime's attitude towards Jews.

The emphasis at least in France's legal community, mirroring the above quote from Laval, was on the alleged malfeasance of Jews. Absent is the German concept of the legal underpinnings of Nazi law as emanating from the ineffable nature of a homogeneous people, of the *Volk* whose spirit was not compatible with the alien spirit of the Jew – of every member of that group due to race and blood, not just of a subset whose individual acts were contrary to the nation's interests.⁹⁴

Indeed, German and French attitudes were the converse of each other, with German Nazis declaring that Jews had to be repressed, *not* because individuals could have no decent characteristics, but because individual traits were irrelevant in the face of biological, racial imperatives. This attitude was articulated by the Nazi higher education minister, Rust, in a speech he made to German academics soon after Hitler's takeover, explaining that, however painful it might be to oust Jews who individually might sincerely wish to take part in German society, the task was necessary because their blood and blood instincts prevented them from being able to be German, regardless of and despite the sympathetic characteristics some individuals might possess.⁹⁵ He professed to feel deeply and personally the tragedy of such individuals,⁹⁶ thereby elucidating Professor Hartman's thesis that Nazi proclamations of the need to treat Jews without mercy sought simultaneously to incite mercilessness against Jews, while maintaining a "claim about the sensitive and open, even gullible, nature of the German."⁹⁷

By contrast, in France both Pétain and Laval balked at eliminating the case by case structure of the denaturalization process established by the law of 1940. In contradistinction to the Nazi German perspective, they thus contemplated at least the possibility that some Jews on an individualized basis might be deemed worthy of remaining French, with the implication that individual characteristics could be redeeming.⁹⁸

94. On the Nazi German concept of the *Volk*, see OLIVER LEPSIUS, *DIE GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG: METHODENENTWICKLUNGEN IN DER WEIMARER REPUBLIK UND IHR VERHÄLTNISS ZUR IDEOLOGISIERUNG DER RECHTSWISSENSCHAFT UNTER DEM NATIONAL-SOZIALISMUS* 38-49 (1994).

95. Rust's speech is reproduced in excerpted form in ANNA MARIA, GRÄFIN VON LÖSCH, *DER NACKTE GEIST* 168-70 (2000).

96. *Id.* at 169.

97. See Geoffrey H. Hartman, *Is an Aesthetic Ethos Possible? Night Thoughts After Auschwitz*, 6 CARDOZO STUD. L. & LITERATURE 135, 146 (1994); see also *id.* at 147 (explaining that overriding importance of biology and race implied for Nazis that barbarity was required against Jews, despite the innate sensitivity of Germans: "the suspension of [German] sensitivity [was required] where Jews [were] concerned"); see also MANZ, *supra* note 67, at 76 ("Today, whenever I witness bravery in other societies . . . or feel the love that other people are capable of, I am reminded of the dark time in my life when I believed the preposterous lie that these mores were the exclusive achievement of the Aryan race."); cf. the German saying during that period: "The German character one day will save the entire world" [Manz's translation: "cure the whole world"] ("*Von deutschem Wesen wird dereinst die ganze Welt genesen*"), quoted in *id.* at 7; and Hitler's statement in *Mein Kampf* that "[t]he Aryan has always been mankind's Prometheus," quoted in *id.* at 75.

98. As Professor Verpeaux has noted, no French statute addressed the issue of Jewish citizenship as such. See Michel Verpeaux, *Le Juif "non-citoyen,"* in *LE DROIT*

Marrus and Paxton note the following excerpt from the first constitutional law textbook published in Vichy France, which at first blush may seem to contradict my assessment of the difference between France and Germany, as well as of the non-evaluative approach of French academic legal commentary with respect Vichy measures: "Given his ethnic character, his reactions, the Jew is not assimilable. So the régime considers that he must be kept apart from the French community."⁹⁹ While this quote is in fact *uncharacteristic* of the bulk of French scholarly legal commentary in the Vichy years inasmuch as it is substantively evaluative rather than hyper-technical in approach, and while it concludes that all Jews should be ostracized without exception, nevertheless it still remains a far cry from the German utter disregard for Jewish "character" and "reactions," or indeed any trait of human individuality, as relevant criteria for discrimination. German legal scholars substituted "blood" and "race" as warranting disregard for any individual characteristics of Jews. Thus, even this fairly exceptional scholarly response to the new French legal order still fell far short of the German scholarly advocacy of eliminating from consideration characteristics that might differentiate individual Jews from each other.¹⁰⁰

While official legal discourse during the Vichy years maintained its distance from the deindividualizing and dehumanizing rhetoric that characterized German legal discourse, French political rhetoric and political propaganda often did reflect the concept of the Jew as irremediably inimical to the French way of life.¹⁰¹ In terms of legal theory, however, perhaps most significant in differentiating the two countries was that German legal theory described Nazism as having ushered in a radically new and different concept of law and the legal order,¹⁰² while French legal commentary (as opposed to political propaganda) tended to do the opposite.

Professor Lochak has analyzed the neutral detachment and technically legalistic approach that typified the French legal scholarly community as follows: "The exclusion of the Jews did not appear [in French academic writing] as an objective dictated by racial hatred or political vindictiveness, but rather as something normal, self-evident, whose rightness was self-evident."¹⁰³ This was because the commentary refrained from taking an eval-

ANTISÉMITES DE VICHY, *supra* note 53, at 189, 198. Thus, in contrast to Nazi German law with respect to German Jews, no French law ended the citizenship of French Jews.

99. MARRUS & PAXTON, *supra* note 90, at 140 (quoting G. BOURDEAU, COURS DE DROIT CONSTITUTIONNEL 189, 191 (1942)).

100. Along these lines, German scholars have noted that Nazi German legal theory decried the provision in Germany's Civil Code, the BGB, that legal rights originate in each person by virtue of birth. See *infra*, notes 344-55, and surrounding text.

101. See Curran, *The Legalization of Racism*, *supra* note 40, at 49. That rhetoric of propaganda was not assimilated by French legal discourse, however, to any extent comparable to its presence in German legal discourse. Pierre Birnbaum has analyzed French antisemitic political propaganda preceding the war in PIERRE BIRNBAUM, LES FOUS DE LA RÉPUBLIQUE: HISTOIRE POLITIQUE DES JUIFS, DE GAMBETTA À VICHY (1992).

102. See *infra* notes 336 et seq. and surrounding text.

103. Lochak, *Écrire, se taire . . . réflexions sur l'attitude de la doctrine française*, LE DROIT ANTISÉMITES DE VICHY, *supra* note 53, at 436 ("L'exclusion des Juifs n'apparaît pas, dans les écrits en question, comme un objectif dicté par la haine raciale ou la vindicte poli-

uative approach, proceeding from the new laws as the point of departure for discussion of their application and interpretation, rather than as the point of the discussion.¹⁰⁴

Lochak's view of positivism's responsibility for French judicial injustice is very similar to the criticism heard in Germany immediately following the war: "Positivism categorically rejects any reference to an alleged natural law and correlatively refuses to subordinate the validity of a legal order to a judgment about its moral worth."¹⁰⁵ Interestingly, although Lochak concludes that it was due to positivism's influence that the French legal community and judiciary automatically accepted the antisemitic legislation, rather than question its moral validity, Lochak herself points out that the same legal scholars who failed to challenge antisemitic enactments did in fact challenge other legislation on moral grounds.¹⁰⁶

The explanation for such a discrepancy hardly can have been due to positivism. An explanation capable of accommodating the apparently incompatible conduct of the same legal actors with respect to differing sorts of legislation lies in the all-important values that those actors held, as

tique, mais comme une chose naturelle, évidente, dont le bien-fondé se situe au-delà de toute discussion.").

104. The noted historian André Kaspi concurs with Lochak. See KASPI, *supra* note 81, at 131-32 (the new law of October 4, 1940, *Loi du 4 octobre 1940*, JOURNAL OFFICIEL, 18 octobre 1940, which permitted all foreign Jews to be interned in French camps, elicited scholarly legal commentary "as brief as the text [of the law] itself." ("*La loi appelle des commentaires qui seront aussi brefs que le texte lui-même.*"). The first French study of Vichy racial measures after the war concurred that, at the time of the laws' promulgation, "the [legal] experts remained silent." ("*Lors de la promulgation, les experts restent muets.*") JOSEPH LUBETZKI, *LA CONDITION DES JUIFS EN FRANCE SOUS L'OCCUPATION ALLEMANDE, 1940-1944*, at 203 (1945), quoted in KASPI, *supra* note 81, at 132. For the contrasting nature of German legal theory, emphasizing its departure from the past, see, e.g., CARL SCHMITT, *NATIONALSOZIALISMUS UND VÖLKERRECHT* 5 (1934) [hereinafter SCHMITT, *NATIONALSOZIALISMUS UND VÖLKERRECHT*] (the new spiritual union effected by Nazism also changed the entire legal community [*"eine neue geistige Verfassung . . . so ändert sich auch die gesamte Völkerrechtsgemeinschaft"*]); and Carl Schmitt, *Nationalsozialistisches Rechtsdenken*, DR 1933, at 224, 228 ("Everywhere National Socialism achieves another kind of order, from the NSDAP-initiated to the numerous new orders, which we see growing before us All of these orders bring their inner law [*"Recht"*] with them Our striving has the direction of living development on our side and our new order emanates from ourselves"). For a description of the radically new and different legal theory of the Nazi scholar Reinhard Höhn, see Ingo J. Hueck, "*Großraum und völkisches Rechtsdenken*": Richard Höhn's Notion of Europe (unpublished manuscript on file with author). Also revealing of the Nazi legal theorists' self-understanding as creating a new theoretical basis for law is the title of Larenz's book, published in 1934: "The Renewal/Regeneration of Law and Legal Philosophy" (KARL LARENZ, *DEUTSCHE RECHTSERNEUERUNG UND RECHTSPHILOSOPHIE* (1934)).

105. Danièle Lochak, *La Légitimation de la Politique Antisémite*, in *Érire, se Taire . . . Réflexions sur L'attitude de la Doctrine Française*, in *LE DROIT ANTISÉMITÉ DE VICHY*, *supra* note 53, at 436 ("*Le positivisme rejette catégoriquement toute référence à un prétendu droit naturel et refuse corrélativement de subordonner la validité d'un ordre juridique à un jugement porté sur sa valeur morale*"); see also Edgar Bodenheimer, *Significant Developments in German Legal Philosophy since 1945*, 3 AM. J. COMP. L. 379 (1954) (noting post-war Germany's interest in natural law and rejection of positivism).

106. See Danièle Lochak, *La Légitimation de la Politique Antisémite*, in *Érire, se Taire . . . Réflexions sur L'attitude de la Doctrine Française*, in *LE DROIT ANTISÉMITÉ DE VICHY*, *supra* note 53, at 437.

Cassirer's comment about the constitutions written in the citizens' minds would suggest.¹⁰⁷ As numerous students of Vichy law and society have concluded in recent years, France as a whole, including its legal community of academics, judges and practicing lawyers, approved of Vichy's antisemitic laws, particularly at the outset, due to widespread, deep-seated hostility principally towards foreign Jews.¹⁰⁸

Like its academics, France's judiciary also accepted the new laws' validity immediately, if not automatically, applying more than 150 new enactments as fast as the new régime issued them and parties brought suit under them.¹⁰⁹ At least implicitly, Lochak's point about French legal scholars might suggest that their positivistic attitude of analyzing the new enactments legalistically and not evaluatively paved the way for the judiciary to do the same, precisely because the French judiciary often takes its cue from "*la doctrine*," or scholarly commentary.¹¹⁰ Had the academics criticized either the legislation itself or the judicial readiness to implement it, instead of contenting themselves to stay outside the realm of ethics, the judiciary may have shown more resistance.

While German legal commentary also is, and was, influential for judicial developments, the French judicial branch had a greater tradition of refraining from independent evaluation than its German counterpart.¹¹¹ The judiciary was the least likely branch to offer resistance even to a repug-

107. See *supra* note 22.

108. See, e.g., WEISBERG, *VICHY LAW*, *supra* note 44; Robert Badinter, *Peut-on être Avocat lorsqu'on est Juif en 1940-1944?*, in *LE DROIT ANTISÉMITES*, *supra* note 53; ROBERT BADINTER, *UN ANTISÉMITISME ORDINAIRE* (1997); MARRUS & PAXTON, *supra* note 90; LABORIE, *supra* note 73; KLARSFELD, *supra* note 73; LEVIN, *supra* note 84, at 429; Curran, *The Legalization of Racism*, *supra* note 40. It is also of interest to note that French antisemitism appeared to target foreign Jews. See Curran, *The Legalization of Racism*, *supra* note 40, at 55-57. However, German publications reflect a greater hatred for the assimilated Jew, on the theory that the assimilated are harder to detect and therefore more nefarious. See CARL SCHMITT, *GLOSSARIUM. AUFZEICHNUNGEN DER JAHRE 1947-51*, at 18 (Berlin 1991) (1958), quoted in DYZENHAUS, *supra* note 13, at 93 n.189 ("*Gerade der assimilierte Jude ist der wahre Feind*"). For ruminations on whether the human tribalist tendency is to persecute the different, the almost-different, or the similar-to-identical, see the superb works of Vladimir Jankélévitch (who coined the term "*le presque-semblable*"), especially VLADIMIR JANKÉLEVITCH & BÉATRICE BERLOWITZ, *QUELQUE PART DANS L'INACHEVÉ* 69 (1978) (arguing that the most intense hostility is elicited by those who are minimally different, the "almost-the-same"); and RENÉ GIRARD, *LA VIOLENCE ET LE SACRÉ* (1972) (arguing that, contrary to general belief, it is identity and not difference that elicits hatred).

109. For all intents and purposes, the new government did not distinguish the legislative from the executive branch, Pétain having been vested with dictatorial and law-creating powers in July of 1940. For a discussion of that process, see Curran, *The Legalization of Racism*, *supra* note 40, at 15-24.

110. On the importance of scholarly commentary in the development of French judicial law, see, e.g., JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 59-60 (1969) ("[t]he teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors"); and André Tunc, *Methodology of the Civil Law in France*, 50 *TUL. L. REV.* 459, 469 (1976) (describing civil law as "a law of law teachers").

111. See generally RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* (Michael Kindred trans., 1972).

nant turn in the law's development.¹¹² The French political theorist, Raymond Aron, noted that even the *Conseil d'État*, the tribunal from which one might have expected more of a critical stance than from lower courts or from the French private law judicial system, also commented and applied the discriminatory *statut des juifs* as though it were a law comparable to any other, and as though its violation of the fundamental laws of the Republic, what in the United States would tend to be described as constitutional principles, could be adopted and accepted without further ado by the legal community, merely because the law had originated in an act of state power.¹¹³

Recent scholarly work on the decisions reached by French courts during Vichy is to be found in Richard Weisberg's *Vichy Law and the Holocaust in France*¹¹⁴ and in his essay, *Legal Rhetoric Under Stress*, in *Poethics*,¹¹⁵ as well as in the compilations of studies edited by Maurice Olender, namely *le Droit antisémite de Vichy*, published in 1996¹¹⁶ and *Juger sous Vichy*, published in 1994.¹¹⁷ The French judiciary may be said to have resisted occa-

112. Although the judiciary in France was subdued, the bar was far less so. In their recent books, both Weisberg and former French Minister of Justice Robert Badinter document the proud tradition of independence of the bars of France, particularly of Paris. See WEISBERG, *VICHY LAW* *supra* note 44; BADINTER, *supra* note 108; accord Lucien Karpik, *La Profession libérale, un cas, le barreau*, in 3 *LES LIEUX DE MÉMOIRE*, *supra* note 19, at 3278 ("la profession [d'avocat], loin de s'inscrire dans les mécanismes sociaux et les institutions existantes, manifeste, depuis l'Ancien Régime, un irrédentisme qui s'affirme dans la revendication de libertés particulières"); see also *id.* at 3285 (solidarity of profession harks back to pre-Revolutionary times).

113. RAYMOND ARON, *MÉMOIRES: 50 ANS DE RÉFLEXION POLITIQUE* 709 (1983) ("Le Conseil d'État commenta et appliqua le statut des Juifs, comme s'il s'agissait d'une loi comparable aux autres, comme si la violation des principes de la République pouvait être acceptée par les juristes à l'instar d'une décision quelconque du pouvoir."). Of course, the Republic no longer existed at that time, the "République française" having been replaced in both substance and nomenclature by Pétain's "État français." Indeed, killing the Republic was a major motivating force among many who opted for collaboration, inspired as much or more by their hatred for the Third Republic as by any other consideration, in a sentiment reminiscent of the widespread revulsion against Weimar in Germany a decade earlier. In his account of the parliamentary debates that led to Pétain's takeover, Emmanuel Berl recounts how the death of the Republic was already understood by France's members of parliament at the infamous July, 1940 assembly, when Marcel Astier, one of the few who had voted against the turn to dictatorship, had called out a last "Vive la République quand même!" His was an isolated voice in the instantaneously-altered rallying cry of simply "Vive la France," the Pétainistes' omitting reference already, *avant la lettre*, to the soon-to-be-defunct Republic. See EMMANUEL BERL, *LA FIN DE LA troisième République: 10 juillet 1940* (1968). On the *Conseil d'État*'s ultra-pétainiste decision to extend to the maximum the law permitting foreigners to be stripped of French citizenship when that meant deportation to concentration camps, see *infra* note notes 125-35 and surrounding text.

114. See WEISBERG, *VICHY LAW*, *supra* note 44.

115. See WEISBERG, *POETHICS*, *supra* note 46, at 143-82.

116. See *LE DROIT ANTISÉMITES DE VICHY*, *supra* note 53.

117. See *JUGER SOUS VICHY*, *supra* note 53. I also have been able to study some additional case law, but generally in a haphazard manner. I will be gaining access shortly to the entire case law of the two highest courts, the *Cour de cassation* and the *Conseil d'État*, from 1940 to 1944, as well as to the complete compilation of legislative enactments during those years, and hope to conduct a comprehensive study of French judicial applications of Vichy law.

sionally in its own way, a way that also harkened back to its time-honored tradition of silent, unacknowledged conduct where overt conduct might have reflected impermissible judicial liberties with enacted law. Notwithstanding numerous cases to the contrary,¹¹⁸ French courts sometimes showed leniency towards Jews who sought judicial relief from the strictures of Vichy's antisemitic laws. In failing to challenge or even to address the validity of enacted laws, the courts were following the tradition they had followed since the Revolution of 1789, according to which the judge's sole tasks were to identify the governing legal text and then apply it. Thus, even when lenient, Vichy-era judges purported to reach substantive results in full compliance with governing enacted law.

Numerous scholars have pointed out that French judges have a long tradition of skirting legislation when they deem it necessary to do so in order to reach the results they believe to be correct in the pending case.¹¹⁹ Since the judges do this in a way that may be described as covert, by applying code provisions whose relation to the issues of the pending case are not apparent or by allowing for interpretations of legislative texts that bear little resemblance to any plausible rendition of those texts, such conduct well might be viewed as *non-positivistic*. On the other hand, however, it also is profoundly positivistic, precisely inasmuch as it refrains from challenging the legislative text and purports to apply it.

Sometimes the courts of Vichy France chose to undermine the new legislation by ignoring its existence, applying pre-Pétain laws that technically continued to be in effect since they had not been repealed and therefore co-existed with Vichy law in mutually blatant but uncommented substantive contradiction. One such instance involved a frantic attempt by a Polish-born Jewish resident of Vichy France to save her French-born child from the fate that ultimately led the mother herself to deportation and death by gassing in Auschwitz. In 1942, Sara Lewendel successfully sought judicial relief from the Vichy law that already had subjected her son to revocation of French citizenship.¹²⁰

According to Article 3 of the pre-war law of August 10, 1927, not repealed in 1942, the child was eligible for French citizenship.¹²¹ Pursuant

118. For an account of some of those cases, see, e.g., Isabelle Lecoq-Caron, *La Preuve de la qualité de Juif*, in JUGER SOUS VICHY, *supra* note 53, at 61-71; Emmanuelle Triol, *L'Aryanisation des biens: L'application judiciaire du statut des Juifs*, in JUGER SOUS VICHY, *supra* note 53, at 41-59. See also Spazierman, *infra* notes 125-35 and surrounding text, in which the court went far beyond the letter of the law, and indeed, in contradiction to its terms, in order to strip the plaintiffs' daughters of their French citizenship at a time when French nationality was the only potential legal protection against deportation left to Jews in Vichy France.

119. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* 431 (1968); John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996). Modern French law textbooks also discuss this. See GHESTIN & GOUBEUX, *supra* note 38, at 318; TERRÉ, *supra* note 57.

120. See ISAAC LEVENDEL, *NOT THE GERMANS ALONE: A SON'S SEARCH FOR THE TRUTH OF VICHY* 78 (1999).

121. See *id.*; see also *supra* notes 89-91 and surrounding text.

to the law of July 22, 1940, however,¹²² anyone naturalized after 1927 was subject to denaturalization.¹²³ Nevertheless, in August of 1942, Judge Chambon granted Lewendel's petition for a declaration that her son Isaac had French nationality. In July of 1942, one month earlier, Vichy had agreed to assist Germany in deporting foreign Jews to German concentration camps, so, by August of that year, French citizenship was the only potential protection against deportation for Jews in Vichy France. This did not prevent abundant denaturalizations from proceeding, however. According to the research of Bernard Laguerre, Jews continued to be denaturalized to June of 1944, even when Vichy was collapsing and German defeat imminent, just as Germany's deportation of Jews from France to concentration camps continued into that June, even as the German military was being routed from France and ultimate military defeat was certain.¹²⁴

Moreover, in December, 1942, the *Conseil d'État* bestowed new meaning on the July 22, 1940 denaturalization law, expanding its scope and ability to strip Jews of citizenship far beyond the reach to which even the 1940 Vichy legislation had aspired.¹²⁵ In the *Spazierman* case,¹²⁶ the *Conseil d'État* considered an appeal by parents who had been stripped of French citizenship pursuant to the law of July 22, 1940, having acquired their citizenship originally pursuant to the law of August 10, 1927. The appeal they brought was not on behalf of themselves, but on behalf of their two daughters.

The *Spazierman* parents challenged a lower court decision to strip their daughters of French nationality under the derivative provision of the 1940 denaturalization law. That provision allowed for derivative denaturalization of the wife and children of persons directly denaturalized pursuant to the 1940 law: "This [denaturalization] measure can be extended to the wife and children of the interested party."¹²⁷ The terms of the 1940 law's derivative denaturalization provision did not, however, target French citizens whose citizenship was not *originally* derivative. In other words, the derivative provision was applicable to all those who had themselves acquired French citizenship through their family relationship to a person naturalized pursuant to the naturalization law of 1927.¹²⁸ In the

122. See *Loi du 22 juillet*, *supra* note 89, at 4567.

123. See *id.*; see also Bernard Laguerre, *Les Dénaturalisés de Vichy (1940-1944)*, 20 VINGTIÈME SIÈCLE REVUE D'HISTOIRE 3, 3 (1988).

124. See Laguerre, *supra* note 123, at 3. Indeed, Mrs. Lewendel, the petitioner before Judge Chambon, had managed to elude deportation for four years but was caught and deported in June of 1944, despite the imminence of Germany's defeat, and was gassed immediately on arrival in Auschwitz. See LEWENDEL, *supra* note 120.

125. See *supra* notes 89-91 and surrounding text.

126. *Époux Spazierman*, 112 RECUEIL DES ARRÊTS DU CONSEIL D'ÉTAT 360 (1942).

127. See *id.*; *Loi du 22 juillet*, *supra* note 89, at Art. 3, ¶ 3 ("Cette mesure pourra être étendue à la femme et aux enfants de l'intéressé.").

128. Accord LES LOIS DE VICHY, *supra* note 69, at 56 (a denaturalization decision pursuant to the 1940 law "was capable of striking in addition to the naturalized person, his wife, who might herself be French by means of family relationship and their children") (emphasis added) ("*une telle décision [de dénaturalisation] . . . était susceptible de frapper*

Spazierman case, however, the daughters had been French citizens *before* the law of 1927 was enacted, by virtue of their birth in France, not by virtue of their father's naturalization.

As the court noted in its decision, the daughters' citizenship had been decreed and registered at the Ministry of Justice on 14 April 1927.¹²⁹ The law of 1927 was enacted only some four months later, on August 10, 1927. The key point germane to the *Spazierman* parents' appeal was that, since the children had acquired their citizenship before the passage of the 1927 law and not through their father's naturalization, they were not within the class of people to whom the derivative denaturalization provision of the 1940 law applied.

The *Conseil d'État* nevertheless affirmed the stripping of citizenship of the French-born *Spazierman* daughters, stating that it was being done derivatively, as a result of their father's denaturalization. The court concluded that the daughters' situation was governed by the denaturalization law of July 22, 1940, providing that those who lost their citizenship thereunder would pass on that loss of citizenship to their spouses and children.¹³⁰ While it conceded the fact that the daughters' citizenship status had not been *acquired* derivatively, the court did not offer any analysis of the legal significance of that fact. The court similarly acknowledged that the daughters had acquired citizenship before the 1927 law had been enacted, but stated that "the law [of July 22, 1940] does not subordinate the latter measure [of withdrawing French citizenship] to any condition concerning . . . the date on which [the interested party] acquired it [i.e., French citizenship]."¹³¹ Inexplicable is the fact that a few lines earlier, in the same sentence, the court had described the governing law of 1940 as providing for "the revision of all acquisitions of French citizenship *that occurred after the promulgation of the law of 10 August 1927.*"¹³² While mutually contradictory statements mar the apparent logic of the court decision, the cryptic nature of the court's narrative is typical of French judicial decisions.¹³³

outré la personne naturalisée, sa femme qui pouvait être elle-même française par filiation et leurs enfants").

129. *See id.*

130. *See id.*

131. *See id.* ("[L]a loi ne subordonne l'application de cette dernière mesure à aucune condition tirée de . . . la date à laquelle ils l'ont acquise").

132. *See id.* (emphasis added) ("[L]a révision de toutes les acquisitions de nationalité française intervenues depuis la promulgation de la loi du 10 août 1927").

133. On the "extreme brevity" and cryptic nature typical of French court decisions, see, e.g., Folke Schmidt, *The Ratio Decidendi: A Comparative Study of a French, a German and an American Supreme Court Decision*, VI ACTA INSTITUTI UPSALIENSIS IURISPRUDENTIAE COMPARATIVAE 3, 5 (1965). Professor Schmidt's schematic representation of various constituent elements of a French, German and U.S. court opinion highlights the fact that the French opinion consisted of 500 words, as compared to the German's 2000 words, and the U.S. (Michigan Supreme Court's) 3400 words, excluding a concurring opinion. While questions may be raised as to such a mechanized comparison on several grounds, the length difference Professor Schmidt signals accurately represents the three legal systems' tendencies in judicial decision writing. Professor Schmidt also describes the French Court of Cassation (the private-law court equivalent of the *Conseil d'État* which

By extending the application of the law of 1940 to citizens who had been French before the law of 1927, and therefore had not been naturalized derivatively from a relative naturalized pursuant to the 1927 law and were outside the class of persons specified as being within the scope of the 1940 law, the court interpreted the 1940 law far more liberally than its terms either mandated or suggested.¹³⁴ In so doing, the court removed from the Spazierman children their only legal protection from deportation by the Nazis, because the *Conseil d'État* decision was rendered shortly after the Vichy government had agreed to assist Nazi Germany in the deportation of foreign Jews from the formerly unoccupied (Vichy) zone.¹³⁵

decided the *Spazierman* case) as reluctant to set forth the analytical basis of its own decision, which "is disclosed only to the extent necessary for a statement whether the court below violated the law or not". *Id.* at 5.

134. Marrus and Paxton refer to another case in which a French Jew was denaturalized under the 1940 law despite having been French before 1927, and, thus not naturalized pursuant to the law of 1927, even though naturalization under the 1927 law was the legal basis for denaturalization pursuant to the 1940 law. Unlike the Spazierman daughters, the person involved had not been born in France. He was, however, a prominent and active member of the French Jewish community, Bernard Lacache, who had been president of LICA, the International League Against Antisemitism, and had acquired French citizenship in 1905. Marrus and Paxton do not comment on the apparent legal impermissibility of this action (if it purported to apply the law of 1940, which was the principal denaturalization law and limited to persons naturalized after August 10, 1927). See MARRUS & PAXTON, *supra* note 90, at 386 n.92. As of this writing, I have not been able to obtain the cited source of their information, which is Jewish Telegraph Agency reports of 13 July 1941, and 31 March 1942. Vichy laws other than that of 22 July 1940 permitted denaturalizations of various categories of people, so Lacache may have been denaturalized pursuant to one of the latter. See LES LOIS DE VICHY, *supra* note 69.

It should be noted with respect to the Lewendel decision described earlier, *supra* notes 120-24 and surrounding text, that if the case had been decided against the plaintiff, it still would not have involved the same disregard of the terms of the 1940 law as did the Spazierman decision. This is because the Lewendel child's acquisition of citizenship (though similarly not of a derivative character) nevertheless had taken place after the promulgation of the 1927 law.

135. Thousands of French Jews had been deported to Nazi concentration camps from the northern zone occupied by the Germans, but the 1942 agreement by Vichy regarding the southern, unoccupied zone was limited to French assistance in the deportation of Jews from that region who were not French. The denaturalization law often resulted in statelessness, since citizenship in one's country of origin generally had been lost when one acquired French citizenship. On this issue, see Leslie Hillman, *La Dénaturalisation des juifs sous le régime de Vichy 1940-1944: L'histoire et les conséquences* (manuscript obtained from the *Centre de documentation juive contemporaine*, on file with author). The members of the commission that denaturalized thousands of Jews (a decision permitted, but never mandated, under governing Vichy law) consisted principally of judges. Karine Labernède has noted that, in addition to government representatives from the Ministries of Foreign Affairs and of the Interior, the commission consisted of a justice of the supreme court of the private law sector (*Cour de cassation*) and four judges of courts of appeal and lower courts. See Karine Labernède, *Les Retraits de nationalité française sous Vichy 1940-1944* (unpublished manuscript obtained from the *Centre de documentation juive contemporaine*, on file with the author).

I searched for the Spazierman daughters' names in the lists of the children deported from France that Serge Klarsfeld compiled and published. Klarsfeld believes his compilation to be the most comprehensive in existence. See SERGE KLARSFELD, *FRENCH CHILDREN OF THE HOLOCAUST: A MEMORIAL* (Glorianne Depondt & Howard M. Epstein trans., 1996). No convoy lists the Spazierman daughters as having been among the deported.

At the other end of the judicial spectrum was Judge Chambon, who, interpreting the same laws that the *Conseil d'État* interpreted so differently in the *Spazierman* case, granted French citizenship to Isaac Lewendel, the French-born child whose mother perished after succeeding in her protective measure of having him legally declared to be French.¹³⁶ Rare as it was, Judge Chambon's decision was not unique. In July of 1943, as the repeal of the 1927 law was imminent, another judge restored French citizenship to a family of Jews who had been denaturalized in 1941.¹³⁷ Although burdened by the duty to adhere to the officially positivistic judicial methodology of France, the courts had freedom to implement their positivistic, or allegedly positivistic, approach without undue concern about contrary results having been reached in precedents since prior court decisions lacked the stature of binding authority that *stare decisis* confers on precedents in common-law legal systems.

While judges restoring citizenship could refer positivistically to the 1927 law as support for their decisions, albeit with an apparent lapse of memory with respect to more recent Vichy legislation, other judges sympathetic to the desperate plight of fleeing Jews had fewer positivistic recourses when they dismissed charges against arrested Jews who were lucky enough to have been brought into the regular judicial system, rather than directly to French camps from which deportation to German concentration camps occurred without due process of law.

Thus, Adolphe Steg was caught and arrested in Lyons as he tried to escape from Paris into the Unoccupied Zone with forged papers in 1942. Having been put in a regular prison rather than a camp, Steg had the good fortune to appear before a sympathetic judge who freed him, and Steg ultimately survived the war.¹³⁸ Under positive law, however, the mandated penalties for Steg's crime were severe.¹³⁹

While Klarsfeld's lists may not be without errors, as the difficulties of reconstructing the lists that Klarsfeld describes in the book make clear, there perhaps is reason to hope that the *Spazierman* daughters survived, despite the *Conseil d'État*'s stripping them of their French citizenship.

136. See *supra* notes 120-24 and surrounding text.

137. See LEVENDEL, *supra* note 120, at 270-71.

138. See Craig R. Whitney, *A Survivor Helps Track French Debt of Wartime*, N.Y. TIMES, Sept. 12, 1999, at 4.

139. The Holocaust Center of Pittsburgh has on display an original sign that was posted on the line of demarcation, warning of the dire penalties for Jews like Steg, who were caught trying to cross the line illegally. The wooden sign, imprinted with large black painted letters, reads as follows: "It is forbidden for Jews to cross the line of demarcation . . . [The sign then proceeds to define who will be deemed to be a Jew]. Any violation to the present order shall be punished by imprisonment or fine. Confiscation of property may also be ordered." ("Il est défendu aux Juifs de franchir la ligne de Démarcation Toute infraction au présent arrêté sera puni par emprisonnement ou d'une amende. La confiscation des biens pourra en outre être prononcée.") (Property of Edward and Judith Friedman, on exhibit at the Holocaust Center of Pittsburgh, Darlington Street, Pittsburgh, Pennsylvania). Other laws allowed for arrested Jews to be delivered to French camps from which deportation to a Nazi concentration camp often was automatic, effectively transforming the penalty for crossing the line of demarcation into the death penalty. André Kaspi describes the experience of crossing the line of demarcation, with French police on one side and German sentinels on the other. He points out

The ethics of judicial activity that undermines evil law through the interpretive powers of judges, and more specifically the issue of whether an inevitable judicial complicity with evil arises even when the courts use their powers to mitigate the injustice of enacted law, has been a subject of some controversy and figures within the debate about positivism. It is the subject of the next section.

2. *The Ethics of Judicial Liberty in the Interpretation of Evil Law*

Following one view, perhaps best represented by such figures as Lon Fuller and Gustav Radbruch, at some point law must cease to be considered law when it contravenes the basic requirements of justice, and therefore judges should declare that such enactments do not constitute law, and do not warrant judicial interpretation or application at all.¹⁴⁰ In a formulation that has since become so famous in Germany as to be referred to as the Radbruchian formula (*die Radbruchsche Formel*), Radbruch wrote that

[p]reference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, "false law" and must therefore yield to justice. It is impossible to draw a sharper line between cases of statutory non-law and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "false law", it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.¹⁴¹

The positivist response, articulated perhaps most clearly by H.L.A. Hart, rejects this view in the measure in which it concerns the definition of law, but Hart emphatically did *not* endorse judicial (or popular) compliance with evil laws.¹⁴² In other words, Hart insisted that laws are laws, no

that the real terror was being sent to the German *Kommandatur*. See ANDRÉ KASPI, *LES JUIFS PENDANT L'OCCUPATION* 152-53 (1991). For an evocative description of frontiers as murderous artifices, see JEAN CLAIR, *LA BARBARIE ORDINAIRE: MUSIC À DACHAU* 16 (2001) ("l'artifice meurtrier des frontières").

140. See Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 345-46 (1973).

141. GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 345-46 (1973) (1932) (originally published as *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE ZEITUNG 105-08 (1946)). The English translation is by Professor Paulson, in Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & PHIL. 313, 317 (1994). The portion of the Radbruch formula quoted above is the second part. For the German courts' application of the formula, see Thomas Mertens, *Radbruch and Hart on the Grudge Reformer: A Reconsideration*, *RATIO JURIS* (forthcoming; manuscript on file with author). For the German post-war turn to natural law, inspired by Radbruch, see FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 465-66, 472-76 (Tony Weir trans., 1995). For the turn to natural law beyond Germany, see *The Resurgence of Natural Law*, in *id.* at 470-72.

142. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49-87, particularly 77 ("we say that laws may be law but too evil to be obeyed").

matter how evil, when they are generated by the authorized law-making authorities, but he insisted with equal vigor that a duty of conscience requires violating laws that do not deserve to be obeyed, and that to say that something is a law is not tantamount to saying that it should be obeyed.¹⁴³ Hart's position thus stands in sharp contradistinction to Lochak's rendition of positivism as "refus[ing] to subordinate the validity of a legal order to a judgment about its moral worth."¹⁴⁴

Hart was quite critical of Radbruch (to an extent that tempts one to disagree with his own assessment that he was not being uncharitable),¹⁴⁵ but what emerges from their disagreement often seems to suggest less substantive disagreement than different focuses of attention. While to Hart it was vital to call law by its proper name, my reading of Radbruch suggests that he was less worried about nomenclature than about the power of legal enactments to command obedience, and in this matter he and Hart were not in conflict. Radbruch in fact distinguished the very meaning of legal positivism in common-law systems from its meaning in civil-law systems, suggesting that in common-law legal culture positivism represented an affirmation of law and justice ("*Bejahung des Rechts*"); while in civil-law legal culture it was no more than an affirmation of enacted law ("*Bejahung des Gesetzes*") capable of encompassing such laws as those Hitler enacted.¹⁴⁶

In more recent times, J.H.H. Weiler's analysis of legitimacy in terms of *social* versus *political* legitimacy, although not addressing the specific debate we are discussing, indicates a way to bridge some of the differences that separated Radbruch and Fuller from Hart. Weiler concludes that "[t]o suggest that the legitimacy of the polity, or some of its features, may be called into question is not to say that the polity is to become illegitimate, either in the strict legal sense or in the court of public opinion."¹⁴⁷ This

143. See *id.*; William Twining, *Other People's Power: The Bad Man and English Positivism, 1897-1997*, 63 BROOK. L. REV. 189, 203 (1997). Thomas Mertens argues that Kant's philosophy also mandates against "[s]trict obedience to immoral duties" imposed by the sovereign. Mertens, *Arendt's Judgement*, *supra* note 50, at 68.

144. See Lochak, *Icrire, se taire*, *supra* note 53.

145. See HART, *supra* note 142, at 75.

146. See GUSTAV RADBRUCH, *DER GEIST DES ENGLISCHEN RECHTS* 49 (1946). Radbruch also had delineated his view of positivism's different valences in the common-law and civil-law systems in an earlier article. See Gustav Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 L. Q. REV. 530 (1936).

147. J.H.H. Weiler, *After Maastricht: Community Legitimacy in Post-1992 Europe*, in SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1992, at 12 (William James Adams ed., 1992); see also Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIBBEAN L. REV. 161, 162 (1997) ("we would call a change revolutionary if it made a great enough change in the political underpinning of state authority—even if it were accomplished with a punctilious regard to existing rules of constitutional change"); J.H.H. Weiler, *Parlement européen, intégration européenne, démocratie et légitimité*, in LE PARLEMENT EUROPÉEN DANS L'ÉVOLUTION INSTITUTIONNELLE 325, 334 (Jean-Victor Louis et al. eds., 1988) (social legitimacy can prevail even where large numbers of the population do not approve of specific governmental measures, provided that a majority approves of the underlying rules); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705, 712 (1988) (the four constituent elements of legitimacy are "determinacy, symbolic validation, coherence and adherence").

statement is in keeping with Hart's definition of the legal as that which is an act of state power within the processes internally envisaged as official and legitimate; but it also suggests, in keeping with Radbruch and Fuller's optic, that social legitimacy is a crucial factor in the success of enacted law, and that when popular opinion views technically legitimate acts as illegitimate, they eventually do lose their claim to legitimacy irrespective of technical internal categories of legitimacy.

Dworkin's position on unjust legislation lies somewhere between Fuller's and Hart's, "a more modern version of nonpositivism [than that of traditional natural-law proponents like Fuller and Radbruch]."¹⁴⁸ To the extent that Dworkin is viewed as a modern, rather than traditional, nonpositivist inasmuch as he, like Hart, contemplates that law can be both evil and yet still count as law (a rendition of Dworkin proposed by Professor Soper which may not be universally shared),¹⁴⁹ it is of interest to note that Cicero, whose *De officiis* has been described as "perhaps the most important classical source for the natural law tradition,"¹⁵⁰ did *not* make the Radbruchian/Fuller claim that evil legislation is not law.

Cicero believed that the civil law must conform to the universal ethical principles of the law of nature. To the extent it fails to do so, it may still be law, but it is bad law: *atqui nos legem bonam a mala nulla alia nisi naturae norma dividere possumus* (But in fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature).¹⁵¹

In terms of the judicial dilemma of how to respond to evil law, Judge Galante Garrone presented an interesting case study. As a judge in Mussolini Italy, he initially adopted the French-style judicial method of covert substantive departures from enacted law, but subsequently decided to leave the bench and go underground. His decision to wage judicial war against fascism by subverting fascist laws case by case eventually gave way to his concluding that he could not succeed in subverting the system from within.¹⁵²

148. E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 517 (1977). One of the most interesting twists in recent legal theory is how it seems that Dworkin, from a common-law tradition, has formulated a vision of law that seems to derive much from traditional civil-law perspectives, while Habermas, from a civilian tradition, is formulating solutions based on common-law themes. It is my hope to be able to elaborate these thoughts in a separate project. For Hart's view of Rawls, see H.L.A. Hart, *Rawls On Liberty and Its Priority*, in HART, *ESSAYS IN JURISPRUDENCE*, *supra* note 142, at 223-47; for Hart's view of Dworkin, see H.L.A. Hart, *Between Utility and Rights*, in HART, *ESSAYS IN JURISPRUDENCE*, *supra* note 142, at 208-22. For an analysis of Dworkin and Rawls in the context of Weimar and Nazi legal theory, see DYZENHAUS, *supra* note 13, especially at ch. 5.

149. See Soper, *supra* note 148, at 517.

150. Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L. L. 405, 413 (1994).

151. *Id.*

152. Lochak offers Garrone's story as anecdotal evidence that France's judges had another option. See Lochak, *Le juge doit-il appliquer une loi inique?*, *supra* note 53, at 30-32. Miriam Assimov's recent biography of Primo Levi, a Resistance friend of Garrone, also contains information about the courageous judge, particularly in his relation to

It is particularly interesting to note this Italian judge's sense of despair about the possibility of fighting fascism from the bench, when one considers how astonishingly greater, more active and more potent the antifascist responses were in Italian society than in either French or German society. Danièle Lochak recounts the story of Judge Alessandro Galante Garrone precisely because she uncovered no comparable judicial response in France from 1940 to 1944.¹⁵³ Udo Reifner recently published the following telling figures in contrasting the Italian and German judiciaries' decisions during their respective fascist periods:

Between 1942 and 1945, the *Volksgerichtshof* (People's Court) condemned 4951 people to death. In the same period, the ordinary criminal courts pronounced about eleven thousand death sentences. . . . Finally, the military courts pronounced another eleven thousand death sentences, raising the death toll of the German criminal courts to at least thirty thousand. . . .

. . . Every judgement of a civil court putting someone under tutelage for feeble-mindedness was in effect a death sentence, as these people were afterwards killed for being "unworthy of living". The judges themselves were well aware of these consequences. . . .

. . . Since convicted Jews were taken to concentration camps, term sentences for Jewish citizens were in effect death sentences. [Research suggests] evidence of collusion between [German] judges and the Gestapo in the persecution of German Jews.

*Compared to the Italian courts, which pronounced less than one hundred death sentences in the entire period of fascist rule in that country, the German courts were veritable death machines.*¹⁵⁴

Matthias Mahlmann puts the number of people murdered through the German judiciary of the Third Reich at a far higher figure - between 40,000 and 80,000.¹⁵⁵

The life-saving efforts of the Italians occupying portions of southern France in actively opposing German orders to round up Jews in their zone was documented by Robert O. Paxton,¹⁵⁶ and more recently has been further documented and discussed extensively by Serge Klarsfeld.¹⁵⁷ Nevertheless, despite what appears to be Judge Garrone's colleagues' hesitation to use the courts for terror, he concluded that he himself was doing more harm than good by continuing to be a judge purporting to apply fascist law.

Levi. See MIRIAM ASSIMOV, PRIMO LEVI: TRAGEDY OF AN OPTIMIST 3, 262-263, 294-295, 296-299, 400 (S. Cox trans., 1998).

153. See Lochak, *Le Juge doit-il appliquer une loi inique?*, *supra* note 53, at 30-32.

154. Udo Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy*, in *THE HOLOCAUST'S GHOST: WRITINGS ON ART, POLITICS, LAW AND EDUCATION* 266 (F.C. DeCoste & Bernard Schwartz eds., 2000) (emphasis added). For a personal account of the extraordinary efforts of the Italian city of Lucca to help impoverished, foreign Jews survive, see LUDWIG GREVE, *WO GEHÖRTE ICH HIN: GESCHICHTE EINER JUGEND* (1994).

155. Matthias Mahlmann, *Katastrophen des Rechtsgeschichte und die autopoietische Evolution des Rechts*, 21 *ZEITSCHRIFT FÜR RECHTSZOLOGIE* 247, 247 (2000).

156. See PAXTON, *supra* note 73.

157. See KLARSFELD, *VICHY-AUSCHWITZ 1943-1944*, *supra* note 73, at 15-18.

Richard Weisberg's thesis on Vichy law concurs with Garrone's view, inasmuch as Weisberg argues that the French judiciary was to blame for not having resisted openly, because the court decisions of even the most liberal, personally compassionate, judge who saved the individual party in the case at bar by engaging in the French judicial tradition of semantic casuistry in his judicial interpretation nevertheless was reinforcing and supporting the very laws he simultaneously was subverting.¹⁵⁸ According to Weisberg, such judges inevitably, even if unwittingly, sent the message to the public at large, to their professional colleagues and to the authorities, that fascist laws deserved the respect, deference and application of the judiciary.¹⁵⁹

Contrary to Weisberg, however, David Dyzenhaus has endorsed the idea of judges resisting evil legislation by attempting to do justice from the bench. In the context of apartheid South Africa, Dyzenhaus explores the dilemma of liberal judges who condoned the idea of judges working from within the system that generated evil legislation rather than going underground.¹⁶⁰ One might object to comparing Vichy France with apartheid South Africa on the basis of the profound differences between common-law and civil-law courts. Indeed, Dyzenhaus himself argues that it is precisely a distinguishing feature of the common-law legal world that would have permitted South African judges to reject unjust enacted law from the bench, and therefore from within the system, thereby saving individual defendants and also effectively reforming the system.¹⁶¹ He calls those legal principles common law principles, or the "common law tradition,"¹⁶² defining them as "principles of freedom and justice which permeate the common law."¹⁶³

My own sense is that nothing Dyzenhaus discusses as a common-law principle is by nature a feature so exclusive to common-law legal systems as to render the South African example incommensurable with the European fascist situation. More specifically, what Dyzenhaus refers to as common-law principles contain strong parallels to the general principles doctrines that do and did exist in Continental European civil-law systems: the *principes généraux* of France and the *Generalklauseln* of Germany, more

158. See WEISBERG, VICHY LAW, *supra* note 44.

159. See *id.* Reifner makes a similar argument with respect to the German courts. See Reifner, *supra* note 154, at 266.

160. See DYZENHAUS, JUDGING THE JUDGES, *supra* note 13. Dyzenhaus goes to considerable pains to be clear that he does not condemn those who made the decision to go underground, however, and indeed admiringly discusses one such case at some length.

161. See *id.*

162. See *id.* at 70.

163. *Id.* at 86 (quoting Arthur Chaskalson). Dyzenhaus' discussion of common-law principles in South Africa also would apply to the United States common-law legal system. For the view of appropriate judicial construction of statutes as equity-driven, see THE FEDERALIST PAPERS No. 78 (Clinton Rossiter ed. 1961). Cf. ARISTOTLE, *supra* note 50, at 21 ("the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement").

fully discussed below.¹⁶⁴

The French judiciary, like the French police and the bulk of the population, initially chose the path of least or lesser resistance, where indeed they chose to resist at all, while some also complied with enthusiasm, harshness and brutality, in attunement with the new régime and its laws. In the new twists that the debate about positivism has taken in recent years with respect to both France and Germany under Nazi domination, there has been a disturbing tendency to condemn fascist-era judges (and others) for failing to resist openly, by positing that they had little to fear, contrary to allegedly self-serving post-war claims.¹⁶⁵ While research in recent decades has indeed uncovered evidence that those very few who did voice opposition from within were not always subject to brutal reprisal, the current tendency to suggest that the failure to resist should be equated with voluntary acquiescence, and even enthusiastic support, is not warranted.

Professor Goldhagen is perhaps the best-known advocate of this position.¹⁶⁶ Others, including Ingo Müller, also have presented compelling evidence that political protesters did not always suffer severe consequences, as where a German judge who, refusing to surrender his conscience, issued anti-Nazi decisions was able to retire with his pension intact.¹⁶⁷ Müller concluded that the case was "extremely revealing. It shows that if a judge refused to accept the injustices of the system, the worst he had to fear was early retirement."¹⁶⁸ Similarly, Nathan Stoltzfus has documented the extraordinary feat of a group of "Aryan" wives, who demonstrated openly in the streets of Germany in 1943 against the imprisonment of their Jewish

164. Moreover, while I have been a proponent of taking care to consider how significant the differences are between the common-law and civil-law legal perspectives, Carl Schmitt's writings (*Gesetz und Urteil*, in particular), make clear that at least German judicial decision-making for almost a century has involved many attributes we tend to associate with common-law processes. See also Hahlo, *supra* note 4, at 246-56 (general clauses resemble common law equitable principles). For a discussion of common-law equity principles in a historical comparison with systems based on Roman law, see James B. Ames, *Law and Morals*, in *JURISPRUDENCE IN ACTION*, *supra* note 31, at 9-30. Dyzenhaus' view is not unrelated to a modern tendency among such theorists as Habermas and Dworkin to look to procedural fairness as the guarantor of substantive justice. For my disagreement with the efficacy of Habermas, proposal, see Curran, *Romantic Common Law*, *supra* note 12. With respect to Dworkin, I tend to agree with H.L.A. Hart's criticism that "procedural fairness . . . is no guarantee that all the requirements of fairness will be met in the actual working of the system in given social conditions." HART, *supra* note 36, at 218. Compare John Gray's comparison of Dworkin with Isaiah Berlin (central value for Dworkin is equality, while central value for Berlin is freedom). JOHN GRAY, *ISAIAH BERLIN* 62 (1996).

165. See, e.g., DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996); JAMES M. GLASS, "LIFE UNWORTHY OF LIFE": RACIAL PHOBIA AND MASS MURDER IN HITLER'S GERMANY (1997); NATHAN STOLTZFUS, *RESISTANCE OF THE HEART: INTERMARRIAGE AND THE ROSENSTRASSE PROTEST IN NAZI GERMANY* (1996); WEISBERG, *VICHY LAW*, *supra* note 44; and MÜLLER, *supra* note 80.

166. See GOLDHAGEN, *supra* note 165.

167. See MÜLLER, *supra* note 80, at 193-95.

168. *Id.* at 195. According to Müller, two German resister judges were executed, but in both cases it was for having participated in the July, 1944 conspiracy to assassinate Hitler, rather than for their activities from the bench. *Id.* at 192-93.

or "non-Aryan" husbands.¹⁶⁹ The husbands' imprisonment in their home town had been intended as a way-station for deportation to death in a concentration camp, as part of completing the objective of making the town *judenrein* by ridding it of its last protected Jewish presence (to wit, the "non-Aryan" husbands of "Aryan" wives).¹⁷⁰ Instead, the husbands were released and some survived.¹⁷¹

It is, however, highly misleading and erroneous to analyze judicial (or other) reaction in the context of information we have today, rather than of what was known or legitimately feared at the time. The brutality of political repression in Nazi Germany and Nazi-occupied Europe was extreme and publicized intentionally.¹⁷² Hostage taking, concentration camps, torture, murder and the removal of resisters' children to distant orphanages frequently ensued from far less resistance than an open repudiation of the new legal enactments.¹⁷³

To the extent that modern scholarship suggests that overall, including judicial, adherence to the new laws emanated from generalized approval of, or at least receptivity to, the new laws in France and Germany, rather than from fear of the consequences of violating the laws, I agree.¹⁷⁴ I disagree, however, with the suggestion heard with growing frequency, and in striking disregard of innumerable aspects of the historical context, that fear of death and torture to oneself and one's family was neither rational nor a genuine motivating force among those who failed to resist. In the case of

169. See STOLTZFUS, *supra* note 165.

170. See *id.* For the day by day account of one such "nichtarier" who survived the Nazi period due to his marriage to an "Aryan" wife, see VICTOR KLEMPERER, *ICH WILL ZEUGNIS ABLEGEN BIS ZUM LETZTEN: TAGEBÜCHER 1933-1945* (1995; 1996) (in two volumes).

171. Jewish or "non-Aryan" husbands of "Aryan" wives were sufficiently (although not reliably) protected in Germany as to allow at least for the possibility of survival without going into hiding, although the chances of survival were not high. Victor Klemperer's Nazi-era diaries illustrate the situation. See KLEMPERER, *supra* note 170. The distinction between "Jewish" and "non-Aryan" is relevant because of the many "non-Aryan" spouses who professed the Christian faith nevertheless failed to meet the legal requirement for "Aryan" civil status. This was Klemperer's situation. He himself did go underground, but only at the very end, preferring to try his chances without his damning "non-Aryan" identification papers after the allied bombing of Dresden allowed for the undocumented to pass unnoticed due to the widespread loss of all things material, and the hopeless chaos the bombing created with police files. My own family history includes similar survival in Berlin of some "non-Aryans" due to marriage, who to the best of my knowledge did not go underground, although they benefited from the additional, helpful legal criterion of having children raised in the Christian community from birth, while Klemperer and his wife were childless. The "non-Aryan" spouse was protected in Germany only if male. Compare the experiences of Jaspers' Jewish wife who, as the Jewish female spouse of an "Aryan," received deportation orders and was forced to live in hiding for years. See HANNAH ARENDT & KARL JASPERS, *CORRESPONDENCE 1926-1969* (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1993). Ironically and somewhat paradoxically, it was only in Germany that any such protection was afforded at all to "non-Aryan" husbands. No such protection existed in any German-occupied country, including France.

172. See Curran, *The Legalization of Racism*, *supra* note 40, at 43-45.

173. See *id.*

174. For a discussion of this issue in greater length, see *id.*

judges in particular, Germany reacted with barbarous brutality to Belgian judges who resisted, creating reason for judges throughout Germany and all of occupied Europe to believe that their own lot would be similar if they resisted.¹⁷⁵ Hubert Schorn has documented the many methods the Nazis employed to cow and terrify the German judiciary.¹⁷⁶ Édouard Daladier, former Prime Minister of France, recounted in his diary some of Pétain's methods of terror against France's judges.¹⁷⁷

In France, moreover, history, tradition and habit conspired to make the judicial branch the least suited in Vichy France to call legislation into question. The judicial branch's status had been of an unequal and inferior branch of government in France since the time of the Revolution, a status unchanged by Vichy, or, incidentally, by the Republics that preceded or succeeded Vichy. Meanwhile, the legislature, traditionally France's most powerful branch, had legislated itself out of existence in its suicidal sessions of July, 1940, in a display of collaborationist zeal. Those members of parliament who had not voted for change in July of 1940 were methodically hunted down, imprisoned and often murdered in the months and years that followed.¹⁷⁸

3. *France's Principes Généraux*

One path of resistance arguably open to France's courts would have been to apply the *principes généraux* ("general principles"), a judicial doctrine that would have allowed judges to comply with the spirit of France's civil code while interpreting specific enacted law. Jacques Ghestin and Gilles Goubeaux describe the *principes généraux* in their *Traité de droit civil* as having the capacity to allow "the introduction into positive law of moral

175. See Didier Boden, *Le Droit belge sous l'Occupation*, in *Le Droit antisémite de Vichy*, *supra* note 53, at 543-58.

176. See SCHORN, *supra* note 7.

177. In his war-time prison journals, Édouard Daladier, former Prime Minister of France, wrote on October 18, 1941 that France's "judges would appear to be on the verge of resigning. The government has let them know that if they do, they'll be sent to prison." ÉDOUARD DALADIER, *PRISON JOURNAL*, 1940-1945, at 90 (Arthur D. Greenspan trans., 1995) (1991). While also a prisoner of the Germans, Paul Reynaud, the last Prime Minister of France before Pétain's investiture, described an official "campaign of fear" in his journal entry for February 24, 1943. PAUL REYNAUD, *CARNETS DE CAPTIVITÉ* 1941-1945, at 258 (1997).

178. Paul Reynaud refers to the fate of those who had voted against turning over power to Pétain at the July 10, 1940 National Assembly. See Reynaud, *supra* note 177, at 33 n.43, 43 n.68, 56 n.96, 60 nn.98-99, 115 n.189. On the more complex, but related, persecution of Léon Blum by Pétain, see WEISBERG, *VICHY LAW*, *supra* note 44, at ch. "The Prisoner at Riom." Further accounts of Vichy retribution against the dissenters are found in MARC FERRO, *PÉTAIN* (1987) and JEAN GALTIER-BOISSIÈRE, *MÉMOIRES D'UN PARISIEN* (1994). Hubert Schorn has argued that one reason German judges were so quick to align themselves with Hitler was that he came to power following the procedures of Weimar, rather than by staging a violent *coup*. See Schorn, *supra* note 7, at 8. While I do not agree that this played a significant role, the argument could be made more forcefully with respect to France, where the technical legality of the end of the Third Republic and transfer of power to Pétain were meticulously respected, and still harder to dispute than in Germany. See Curran, *The Legalization of Racism*, *supra* note 40.

rules or of principles of natural law.”¹⁷⁹ Ghestin and Goubeaux suggest that *principes généraux* are suitable particularly where the judiciary is handling new law, as was the case for Vichy enactments.¹⁸⁰ The *principes généraux* also have been described as “a dimension of the notion of fairness” (“une dimension de la notion de fairness”),¹⁸¹ and as a “cultural code.”¹⁸²

Since the *principes généraux* are a judicial doctrine, they are not officially amenable to application to private law legislation inasmuch as French courts do not have judicial review over legislative acts.¹⁸³ Not surprisingly, given the inferiority endemic to France’s conception of the judiciary’s place within the branches of government, an inferiority codified into legal nomenclature -by Articles 64-66 of the 1958 Constitution- which describe the judicial branch as a mere “*autorité*” (“authority”) while the other two are “*pouvoirs*,” (“powers”),¹⁸⁴ the French courts traditionally have not been prepared to indulge in open application of their *principes généraux*. At least two scholars have suggested an association of the traditional French judicial rejection of *principes généraux* with the French positivistic judicial “aversion to all that is hazy or flexible.”¹⁸⁵

On the other hand, the *principes généraux* offer a last recourse to justice where the legislator has failed the individual. As Professor Rogoff notes, “[s]uch fundamental rights, which are mostly entrenched in the text of the United States Constitution, in French law are protected to a large

179. GHESTIN & GOUBEAUX, *supra* note 38, at 338 (“Ils permettraient l’introduction dans le droit positif de règles morales ou de principes du droit positif.”); see also Andrée Lajoie et al., *Pluralisme juridique à Kahnawahe?*, 39 LES CAHIERS DE DROIT 681, 685 (1998) (associating *principes généraux* with tacit governing social presumptions).

180. GHESTIN & GOUBEAUX, *supra* note 38, at 339.

181. Nathalie Belley, *L’Immergence d’un principe de proportionnalité*, 38 LES CAHIERS DE DROIT 245, 311 (1997) (in the context of the Civil Code of Québec, which contains explicit references to *principes généraux*).

182. Lucie Lemonde, *L’Impact de l’intervention judiciaire sur l’évolution des normes canadiennes en matière de libération conditionnelle*, 40 MCGILL L.J. 581, 590-93 (1995) (in the context of Canadian law).

183. The *Conseil constitutionnel* has acquired judicial review in recent times; the *Cour de cassation* has acquired a sort of judicial review, and indirectly all French national courts have acquired another variant of judicial review through their power to refer national cases to the European Court of Justice in order to ensure compliance with European law. See *The Reviewing Powers of the Court of Cassation and the Conseil d’Etat*, in ARTHUR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 307-09 (Little Brown & Co. 1977) (1957). On the fledgling powers of legislative review of the *Cour de cassation*, see Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 77-78 (1997). See also J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (the national judiciaries of European Union Member States have gained in power internally through their effective power to review national legislation in terms of compliance with European legal standards).

184. But see RASSAT, *supra* note 45, disagreeing that this nomenclature was intended to reflect the judiciary’s inferiority, and challenging the widespread view of the French judiciary in this light.

185. Guiseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 400 (1995).

extent by resort to the unwritten *principes généraux*.”¹⁸⁶ Moreover, according to the French constitutional law scholar, Jean Carbonnier, the *Code civil* is seen within France as having constitutional significance, “for in it are recapitulated the ideas around which French society was constituted at the end of the Revolution, and continues still today to be constituted, developing those ideas, perhaps transforming them, without ever having denied them explicitly.”¹⁸⁷ Professor Jeanneau has stated that the expression “superior principle” often is used to refer to the *principes généraux*, and, in his words, “very happily conveys the transcendence of the *principes généraux*.” (“*nous paraît très heureusement traduire la transcendance des principes généraux*”).¹⁸⁸

The ultimate justification and legitimation for the *principes généraux* within French legal culture is problematic, however. Under one view, in applying the *principes généraux*, the courts theoretically at least are doing nothing creative, but, rather merely giving voice to the presumed legislative intent of preserving fundamental individual rights.¹⁸⁹ In accordance with this position, one commentator has reasoned that, at least ideally, embedded within the concept of the *principes généraux* is the tenet that they impose themselves on the judge, rather than vice versa (“*le principe devrait, par sa nature, s'imposer au juge*”).¹⁹⁰ Such a view reinforces the traditional French allocation of powers between legislature and judiciary, which none other than Carl Schmitt captured incisively when he observed that in France “the law-giver is supposed to create laws, . . . not [other] law-givers.”¹⁹¹

Arguably, a judicial presumption of legislative intent to preserve individual rights would have been invalid in Vichy France, which relegated individual rights to a lesser status than communal rights,¹⁹² a situation

186. Rogoff, *supra* note 183, at 76 (quoting L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 209 (4th ed. 1993)). For a United States commercial law analogy to European general principles, including both the French *principes généraux* and the German *Generalklauseln*, see Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201 (1991). For a discussion of *principes généraux* as linked to lack of codification in French international private law, see Paul Lagarde, *Sur la Non-codification du droit international privé français*, 25 SYRACUSE J. INT'L. & COM. 45 (1998).

187. Carbonnier, *supra* note 19, at 1345 (“*car en lui sont récapitulées les idées autour desquelles la société française s'est constituée au sortir de la Révolution et continue de se constituer de nos jours encore, développant ces idées, les transformant peut-être, sans avoir jamais dit les renier*”).

188. B. Jeanneau, *La Nature des principes généraux du droit en droit français*, in *CONTRIBUTIONS FRANÇAISES AU 6ÈME CONGRÈS DE DROIT COMPARÉ* 204-09 (1962), reprinted in OTTO KAHN-FREUND, ET AL., *A SOURCE-BOOK ON FRENCH LAW* 188 (2d ed. 1979).

189. See Rogoff, *supra* note 183, at 6; accord Boulanger, *supra* note 38, at 73.

190. Belley, *supra* note 181, at 311; accord GHESTIN & GOUBEAUX, *supra* note 38, at 337 (*principes généraux* are derived from enacted law by a process of “*induction amplifiante*”).

191. CARL SCHMITT, *Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen: Legislative Delegationen* (1936), in *POSITIONEN UND BEGRIFFE: IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES 1923-1939*, at 214, 217 (Duncker & Humblot 1988) (1940) (“*der Gesetzgeber soll eben Gesetze und nicht Gesetzgeber machen. . .*”).

192. See Curran, *The Legalization of Racism*, *supra* note 40, at 7.

that would militate in support of the judicial refusal during those years to enter into the “hazy” and “flexible” territory of the *principes généraux*.¹⁹³ The view that *principes généraux* are judicially inferred from legislation on the whole has tended to be rejected in recent legal scholarship, however, with general principles often perceived simply as allowing the judiciary to impose its own legal norms, although this perspective has been more frequent outside of France than in France.¹⁹⁴

Professor Frier has accurately stated that European civil codes contain general clauses or general principles.¹⁹⁵ What they all have, however, and what he is referring to, are such principles in concrete form as particular code provisions ranked at the same level as all others, rather than as overarching, superseding general norms. What Professor Frier refers to as general principles, Professor Boulanger would have considered to be no more than *juridical rules*, to be distinguished from *principes généraux*, although in his opinion they often erroneously were confused with *principes généraux*.¹⁹⁶ Professor Boulanger refers to *principes généraux* as principles that direct and govern positive law,¹⁹⁷ while juridical rules are only applications of the *principes généraux*.¹⁹⁸ According to Professor Boulanger, the task of surmising the contents of the *principes généraux* legitimately belongs to the judge interpreting positive law.¹⁹⁹

In other words, what European codes do *not* all have, and what France in particular lacks, as does Germany, is a statement in the civil code explicitly enabling judges to apply general principles *in lieu of* specific code articles.²⁰⁰ Thus, while both the Swiss and Italian civil codes do explicitly direct judges to decide cases according to the spirit of their nation's laws, a

193. See *supra*, note 185.

194. See Frier, *supra* note 186, at 2202; cf. Boulanger, *supra* note 38, at 66-67 (calling the *principes généraux* in France “a manifestation of . . . the praetorian power of case law” (“une manifestation du . . . pouvoir prétorien de la jurisprudence”), but yet also insisting on judges’ duty to find the principles from within legislation).

195. See Frier, *supra* note 186, at 2202.

196. See Boulanger, *supra* note 38, at 56-57.

197. *Id.* at 57 (“[p]ropositions directrices, les principes règnent sur le droit positif”).

198. *Id.* (“Les règles juridiques sont des applications des principes”). The German view of *Generalklauseln* generally is that they are positive law, in just the way Professor Frier describes them. They have been endowed with a strong connection to constitutional principles through the case law development of the Federal Constitutional Court. Cf. RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG, *supra* note 7, at 455 (the issue as to whether general principles of law can be derived from positive law or from extra-positive values represents a decision between two fundamentally different conceptions of law).

199. Boulanger, *supra* note 38, at 57 (emphasizing also that legal scholarship is of primordial importance in assisting judges in this task).

200. The BGB drafters originally did include such a provision, but deleted it from the final version because they felt it was clear, albeit implicit. See *Entwurf des BGB von 1888*: “Auf Verhältnisse, für welche das Gesetz keine Vorschrift enthält, finden die für rechtsähnliche Verhältnisse gegebenen Vorschriften entsprechend Anwendung. In Ermangelung solcher Vorschriften sind die aus dem Geiste der Rechtsordnung sich ergebenden Grundsätze maßgebend.” On the drafters’ decision to omit this language due to its self-evidence, see Thomas Möllers, *Die Bedeutung der Methodenlehre im demokratischen Rechtsstaat*, in JURISTISCHE METHODENLEHRE (citing RAISER, DAS LEBENDE RECHT, RECHTSZOLOGIE IN DEUTSCHLAND 152 (1999)) (forthcoming, manuscript on file with author).

spirit conveyed by the entirety of the code,²⁰¹ France's civil code is silent on this matter, beyond its Article 4 requirement that judges decide all cases, and the concomitant prohibition against judges abstaining from judgment on the ground that enacted law is ambiguous or nonexistent.²⁰²

Directions within positive law that oblige judges to depart from positive law create a paradoxical situation in terms of what positivism signifies, since they may be seen as a positivistic instruction to engage in anti-positivism. In France, one might consider the issue as that of the "*principes généraux* of the *principes généraux*," somewhat analogous to the "*Kompetenz-Kompetenz*" problem of the European Court of Justice.

The dilemma was particularly acute for France's courts during the Vichy period, because no legal text whatsoever authorized judicial use of *principes généraux*. Professor Jeanneau, unlike many of his French colleagues, did espouse the view that even the *principes généraux* specific to France reflected normative judicial power. He stated that the absence of textual legal authority for *principes généraux* caused "the latent aspirations of the national conscience from which *principes généraux* emanate to remain in a state of diffuse emotion so long as the judge has not formulated them as clear rules."²⁰³ He argued in particular that French judges can claim neither enacted law nor even custom as their authorizing source, since even custom precedes judicial action, and therefore can be implemented by judges but not created by them: "[W]e are unable to see in the *principes généraux* a customary phenomenon because they are the work of the judge more than of the collectivity."²⁰⁴ It is in this sense that the *principes généraux* correspond to normative judicial power.²⁰⁵ Jeanneau concluded that, although the *principes généraux* had to be viewed in terms of judicial power to create law, such power need not be arbitrary: "[T]he *principes généraux* of [French] law formally draw their legal strength from the act of the judge who formulates them, but they derive their concrete authority and their influence from the philosophical and moral sources

201. See Article 1, Swiss Civil Code; and Article 12, Italian Civil Code. It is interesting to note that the year in which this article became effective in Italian law was 1942.

202. See Article 4, CODE CIVIL ("*Le juge qui refusera de juger, sous prétexte de silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*"). Professor Boulanger does see in article 4 an implicit reference to judicial recourse to *principes généraux*. See Boulanger, *supra* note 38, at 64 ("*L'article 4 du Code civil impose au juge, sous peine de déni de justice, de rendre une décision malgré le silence de la loi Nous constaterons que la découverte, puis la mise en œuvre, des principes lui apportent un puissant secours*").

203. See Jeanneau, *supra* note 188, at 186 ("*Dépourvues de cet apport concret les aspirations latentes de la conscience nationale dont procèdent certains principes généraux restent à l'état de sentiments diffus tant que le juge ne les a pas formulées en règles claires*").

204. *Id.* at 186 ("*nous ne saurions voir dans les principes généraux un phénomène coutumier parce qu'ils sont davantage l'œuvre du juge que celle de la collectivité.*"). Contra GHESTIN & GOUBEAUX, *supra* note 38, at 337 (*principes généraux* can be derived from custom); Boulanger, *supra* note 38.

205. See Jeanneau, *supra* note 188, at 186.

that nourish them."²⁰⁶

During the Vichy period, however, not even the French Constitution endorsed judicial use of *principes généraux*. Although the issue is debatable, arguably the Constitution of the Third Republic remained effective throughout the Vichy years, despite parliament's vote of July 10, 1940 to grant Pétain the power to rewrite the French Constitution, inasmuch as Pétain in fact never did issue a new Constitution. The problem with respect to the *principes généraux* persists, regardless of whether the Constitution of the Third Republic is deemed to have been effective, however, to the extent that that Constitution's endorsement of *principes généraux* would have to have resulted from its incorporation of the 1791 Constitution, which contained the *Declaration of the Rights of Man and Citizen* of 1789. But the Constitution of 1875, in place during of the Third Republic that immediately preceded Vichy and at least nominally in effect during Vichy, did not yet incorporate by reference the *Declaration* of 1789.²⁰⁷ Consequently, it was only *after* Vichy that the principles of 1789, with their arguably implicit legitimation and authorization of *principes généraux*, entered French positive law, when the Fourth Republic's Constitution of 1946 incorporated them by reference into its Preamble, an incorporation subsequently repeated in 1958 in the current Fifth Republic's Constitution.²⁰⁸ Thus, to the extent that enacted law was deemed a necessary source of legal authority for the judiciary to make use of *principes généraux*, French legal theory would have militated against judicial application of *principes généraux* until after the war as a matter of methodological propriety.

Notwithstanding the above, *principes généraux* did exist as a judicial doctrine before Vichy, predating their 1946 incorporated entry into French positive law.²⁰⁹ Traditionally, however, they were particularly disfavored by the private law courts, a fact which some attribute to the effect of codifi-

206. *Id.* at 188 ("les principes généraux du droit tirent formellement leur force juridique de l'intervention du juge qui les édicte, mais tiennent matériellement leur autorité et leur rayonnement de la source philosophique et morale à laquelle ils s'alimentent").

207. I do not mean to adopt the position that the Constitution of 1875 was in effect during Vichy, but rather argue that, even if it was, there would have been no textual incorporation by reference of *principes généraux*. The more widespread view has been that the Constitution of 1875 was *not* in effect during the Vichy period. See, e.g., JACQUES GODECHOT, *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, at 339 (Garnier-Flammarion 1995) (1979) (equating the July 10, 1940 National Assembly vote, and the three "constitutional acts" of Pétain that followed in the next days with a repeal of the 1875 Constitution).

208. See Jeanneau, *supra* note 188, at 184-85. For the texts of the 1946 Constitution, the *Declaration of the Rights of Man and Citizen*, and the 1958 Constitution, see GODECHOT, *supra* note 207. Professor Jeanneau rejected even the idea that the *principes généraux* had as their legal source the 1789 *Declaration of the Rights of Man and Citizen* or the French Constitution, although he saw both of those texts as an ideological source of *principes généraux*. See Jeanneau, *supra* note 188, at 184-85.

209. See GIRARD, *supra* note 108, at 207 ("alongside the general principles that constitute an expansion and systematization of principles posed by the legislator, there is another category of general principles, whose character is reforming, rather than conforming . . . broad value-oriented norms, which some will call basic concepts of the society and others will call natural law").

cation on the French private law adjudicative process.²¹⁰ In other words, it was the absence of codified, enacted, textual law in the public-law realm that allowed for a degree of comfort with concepts so amorphous, “hazy” and “flexible” as *principes généraux* in the public-law tribunals, a limited comfort but nevertheless greater than in the private-law tribunals.²¹¹

Given the traditional French judicial antipathy against the vague, the unwritten, as well as against the appearance of judicial law-creation, and given the judiciary’s self-understanding as a subservient branch within the governmental separation of powers, it is not surprising that the courts of Vichy France eschewed the use of *principes généraux* as they grappled with interpretation in an altered legal universe.

The reaction against judicial positivism that arose in France after the war, and that Danièle Lochak espouses, also became internalized by the courts. France’s association of positivism as a cause of judicial injustice because it was synchronous with the substantive judicial injustice of the Vichy period, is nowhere more strongly evidenced than in the fact that the *principes généraux* finally did obtain favor in France after the end of the Second World War as a reaction against the Vichy period. This development was all the more momentous because French judicial formalism had not been a phenomenon just of the war years, but, as discussed above, was a tradition deeply entrenched in the history and politics of the country.

In their *Traité de droit civil*, Ghestin and Goubeaux explicitly remark that it was only after 1945 that France’s *Conseil d’État* has applied, in its own words, “the general principles of law applicable even in the absence of textual law.”²¹² Moreover, as recently as 1977, Ghestin and Goubeaux still noted as justification for the *principes généraux* (contrary substantively to Jeanneau’s view)²¹³ that the judge does not create them, but merely identifies them, finding them “suspended in the spirit of our law” (“*en suspension dans l’esprit de notre droit*”).²¹⁴ Similarly, in the 1999 edition of his *Introduction générale au droit civil*, Patrick Courbes describes the *principes généraux* as ensuring the law’s coherence when properly considered, because they limit the judicial freedom to interpret by confining it to the realm of the legislator’s intent.²¹⁵

While Ghestin and Goubeaux discuss the use of *principes généraux* in French public law adjudication, the French private-law domain also began

210. See, e.g., GHESTIN & GOUBEAUX, *supra* note 38, at 333.

211. See *supra* note 185.

212. GHESTIN & GOUBEAUX, *supra* note 38, at 333; accord TERRÉ, *supra* note 57, at 267. Ghestin and Goubeaux also note that international legal entities also espoused general principles doctrine after the end of the Second World War; in particular, Article 38 of the Statute of the International Court of Justice created by the United Nations. *Id.* at 338.

213. See *supra* notes 203-06 and surrounding text.

214. GHESTIN & GOUBEAUX, *supra* note 38, at 336 n.57 (quoting JEAN CARBONNIER, INTRODUCTION 145 (“les principes généraux ne sont pas créés par le juge, mais identifiés, constatés, trouvés en suspension dans l’esprit de notre droit”)).

215. See PATRICK COURBE, INTRODUCTION GÉNÉRALE AU DROIT 52 (6th ed. 1999); accord GHESTIN & GOUBEAUX, *supra* note 38, at 340.

to accept and apply them more freely and less timidly in a dramatic *volte-face* after the war.²¹⁶ In his analysis of the French courts' current favoring of *principes généraux*, Professor Terré, writing in 1998, evokes the traditional French concern that the judicial use of *principes généraux* will mean judicial power over the legislator, with the possibility of a case law that contradicts enacted law.²¹⁷ The books of Terré and of Ghestin and Goubeaux thus reflect continuing theoretical discomfort in France with *principes généraux*, even as the courts show increased willingness to apply them. These contemporary French legal scholars repeatedly describe *principes généraux* as "perplexing," "ambiguous," and "obscure."²¹⁸ Similarly, although writing in 1951 (considerably fewer years after the war than Terré or Ghestin and Goubeaux), Professor Boulanger noted the continued reluctance of the *Cour de cassation* to evoke *principes généraux* openly, even when it did apply them: "Sometimes the *principe* can be perceived only by, so to speak, reading between the lines: only an analysis of the decision allows one to discern it."²¹⁹

Interestingly, the French reluctance to seek *principes généraux* outside of the realm of positive law had not been a tenet of early French legal theory, nor even of all late nineteenth-century legal theory in France. Such early theorists as Domat, who lived from 1626-1696 and was a major influence on the Code drafters, in his *Traité des loix* of 1689,²²⁰ and Planiol, two centuries later in his *Traité élémentaire de droit civil* of 1899,²²¹ both referred to *principes généraux* as external to the positive legal order, a concept which Boulanger has characterized as "secularized natural law" (*le "droit naturel laïcisé"*).²²²

Professor Boulanger, however, insisted that the sole arena for legal authority for *principes généraux* was the positive legal order.²²³ Despite rejecting natural law as the source of *principes généraux*, Boulanger nevertheless defined the *principes généraux* as normative propositions to which positive law solutions are *subordinated*.²²⁴ These statements are mutually compatible, since case solutions can be subordinate to *principes généraux*, even if the *principes généraux* themselves need to be derived from the entirety of positive law, from its spirit, or, as Boulanger frequently expressed the concept, from the positive legal "order." Indeed, he believed

216. For a discussion of the *principes généraux* in French private law, see TERRÉ, *supra* note 57, at 268-71.

217. See *id.* at 270-71. On the traditional French dread of a "*gouvernement des juges*," see MERRYMAN et al., *supra* note 42, at 450.

218. See esp. TERRÉ, *supra* note 57, at 270.

219. Boulanger, *supra* note 38, at 65 ("*Parfois même le principe ne s'aperçoit qu'en filigrane, pour ainsi dire: seule l'analyse de la décision permet de le déceler*").

220. DOMAT, *TRAITÉ DES LOIX: LES LOIX CIVILES DANS LEUR ORDRE NATUREL* (1689).

221. MARCEL PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* (1899).

222. *Id.* at 53. For a more recent account of general principles as natural, human-wide and as superseding positive law in all legal systems, see Del Vecchio, *supra* note 22.

223. See Boulanger, *supra* note 38, at 53-54 (citing the views of Henri Capitant as providing support for his own).

224. *Id.* at 56 ("*des propositions auxquelles des séries de solutions positives sont subordonnées*").

that although *principes généraux* are derived from positive law, they are not necessarily derived from any specific enacted law.

In this context, Boulanger was critical of the French exegetical school for its position that no principles could acquire legal force or justification unless they could be linked to specific legal texts.²²⁵ Perhaps of greatest significance in terms of our discussion of the role of the *principes généraux* in French law, Boulanger rejected the view that formalistic judicial interpretations, of enacted law or any other source of legal authority, could aspire to the sort of mathematically precise and rigorous logic that would allow judicial reasoning to reach results that could be trusted without concern for their fairness or relation to justice.²²⁶

Such closed formalism as Boulanger decried was, however, the practice of France's courts during the Vichy years. Richard Weisberg has described French judicial interpretation by the courts of Vichy France as consisting of "rigorous, low-level technical" readings.²²⁷ Weisberg concurs with me in viewing the French judicial manner of interpretation during that period as having been a continuation of its past tradition.²²⁸ While Weisberg focuses on the similarity between French judicial interpretation of legal texts and post-modernist textual interpretation, his findings would support my characterization of the courts' methodology as positivistic, formalistic, and continuing their time-honored reluctance to tread in the uncertain waters of *principes généraux*. Paxton and Marrus similarly characterize the French judiciary of the Vichy years as having maintained "a viewpoint of 'strict construction,' holding to the letter of the law."²²⁹

It is tempting to infer a dynamic of causality between the French judicial approach from 1940 to 1944, and substantive outcomes that disregarded larger issues of justice and constitutionality. Judicial positivism and formalism seem to imply a judicially wrought self-referentiality in enacted law, which in turn would seem to explain how the courts of France from 1940 to 1944 saw their way to effecting the robbing of citizens through the implementation and application of property "aryanization" laws, and ultimately enabled the rounding up and deportation of some 75,000 people through the judicially sanctioned progressive deprivation of individual rights, rights that had seemed well-established in pre-war French legal culture.²³⁰

It is precisely the contrast of Germany's anti-positivism that gives one pause before concluding too quickly that formalistic, positivistic judicial

225. *Id.* at 63.

226. *See id.* at 63 ("*les solutions injustes ou fâcheuses*" never are legitimate) (citing PLANIOL, *TRAITÉ ÉLÉMENTAIRE* I (7th ed., no. 131)). In this he was in profound sympathy with the German legal theorist Hermann Kantorowicz, and the Free Law School. *See infra* notes 272-320 and surrounding text.

227. WEISBERG, *VICHY LAW*, *supra* note 44, at 389.

228. I disagree with Weisberg to some extent on his characterization of that tradition. *See* CURRAN, *The Legalization of Racism*, *supra* note 40, at 38-39.

229. MARRUS & PAXTON, *supra* note 90, at 140.

230. The texts of the principal "aryanization" measures are reprinted in Appendix 4 ("*annexe*" 4), in *LE DROIT ANTISÉMITES DE VICHY*, *supra* note 53, at 591-98.

methodology, with its effect of making enacted law self-referential and beyond challenge, necessitated the results that the courts of Vichy France reached. The German judicial tradition and practice of applying the German version of general principles, namely, the *Generalklauseln*, suggest that the *principes généraux* could have been used in France to perpetrate judicial outcomes as rabidly unjust as those which the French courts did realize through their positivistic applications of antisemitic laws and rejection of *principes généraux*.

Once the causal link between methodology and substantive outcome is called into question, one also may become more receptive to the ever-present possibilities, even during Vichy France, for France's courts to have entertained traditionally accepted judicial methods for reaching results they wanted to reach, regardless of whether they violated enacted law in the process. Under the traditional judicial methodology, the *principes généraux* would not have been necessary, since judicial departures from enacted law often were undeclared, under the "cover of interpretation," as Ghestin and Goubeaux put it.²³¹

One might interpret this dual tradition as meaning that positivism is correlated with unjust decisions, inasmuch as French judges reached unjust results when they were positivistic in applying the fascist enactments. The counterargument is threefold. Firstly, the covert, arguably "non-positivistic" activity in French judicial tradition that allowed judges to manipulate enacted law so as to reach substantive outcomes selected for reasons independent of enacted law, must itself be seen as an aspect of positivism because the judicial claim that it was applying enacted law signaled judicial approval of enacted law, even where the application may have been non-apparent, or even non-existent.

Secondly, positivism was implemented selectively, in accordance with how state power and brute force backed the new laws, as opposed to judicial positivism with respect to the wealth of prior, unrepealed laws. This judicial choice as to which laws to apply is difficult to separate from positivism because it was a constant in the judicial decision-making process.

Thirdly, the German experience with *Generalklauseln* shows that the alternative to positivism by means of *principes généraux* would have been equally likely to yield results consistent with contemporaneous political ideology, refuting the proposition that positivism was an important culprit in causing judicial injustice. The role of political ideology in conjunction with the values held by the judges as individuals and as parts of the judicial institutions, rendered the different styles that typified each country's respective national judiciary of limited influence on substantive legal outcomes.

In addition, once one is prepared to challenge the concept of a causal connection between judicial methodology and substantive legal outcome, it also becomes easier to view the French judiciary in its larger context as part of a country in crisis, and to consider that the causes of substantive

231. See *supra* note 38.

judicial injustice may have had less to do with judicial methodology and philosophy than with the judiciary's participation in the nation-wide receptivity to collaboration for purposes of national survival, a reaction that occurred throughout France not just after its unexpected and psychologically devastating military defeat, but that also was situated in the aftermath of national exhaustion from still lingering effects of the previous world war's catastrophic losses.

Pétain spawned a pervasive, if short-lived, hope that compromise with the occupier might allow France to weather the tide of Nazism, the apparent wave of the future, without being drowned in its wake. Once one is prepared to doubt the causal connection between judicial methodology and substantive legal outcome, one can more easily understand that those phenomena we earlier referred to as "sets of variables"²³² were mere fragments in a much larger universe.

B. Germany

1. *From Formalism to Anti-Formalism*

The German experience, in some ways, was almost diametrically opposed to the French experience, despite initial appearances of similarity. The outcry after the Second World War against judicial positivism in Germany²³³ succumbed to growing compelling evidence that German courts during the Nazi era had largely been anti-positivistic in their methodology, and that in this they had continued an anti-formalistic, anti-positivistic judicial tradition that dated from well before the Nazi era.²³⁴

A typical post-war German critic of positivism was Judge Weinkauff, whose highly successful career had begun under Hitler, and who remained a judge after the war. His rendition of positivism as the culprit for Nazi judicial abuses implicitly exculpated his own decisions from the bench, as well as those of his judicial brethren. According to Weinkauff, it was positivistic training that had led German judges to their decisions in "their encounters with the non-law enacted by the National Socialist state. Judges . . . were, owing to their training, virtually all proponents of legal positivism, with an almost naive sense of its obviousness."²³⁵

232. See *supra* note 26.

233. For pertinent references to the "renaissance of natural law thinking in post-war Germany," see Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views?*, 5 OXFORD J. LEGAL STUD. 489, 489 n.6 (1995).

234. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7; Maus, *supra* note 58, at 80-103; Walter Ott & Franziska Buob, *Did Legal Formalism Render German Jurists Defenceless During the Third Reich?*, 2 SOC. & LEGAL STUD. 91 (1993).

235. HERMANN WEINKAUFF, *Die deutsche Justiz und der Nationalsozialismus: Ein Überblick*, in HERMANN WEINKAUFF ET AL., *DIE DEUTSCHE JUSTIZ UND DER NATIONALSOZIALISMUS* 17, 28 (1968), quoted and translated in Paulson, *supra* note 36, at 358. Paulson also notes that Weinkauff insisted on his positivism defense as late as 1970. See *id.* at 359 n.117 (citing Hermann Weinkauff, *Positivismus als juristische Strategie?* 25 JURISTENZEITUNG 54-57 (1970)). By 1970 numerous German scholars had debunked positivism as a viable culprit theory. Bernd Rüthers' book had been published in 1968, see RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, and Ingo Müller's book was published in 1987 (original German publication). See MÜLLER, *supra* note 80. Rüthers

The myth of judicial positivism in Germany slowly unraveled. Indeed, Wieacker concluded that the German judiciary before 1933 interpreted enacted law with "more initiative than courts in . . . even Anglo-Saxon jurisdictions."²³⁶ According to Wieacker,

it was impossible even before 1933 to infer from the text of the Code what the law actually was This achievement was effected quietly, unobserved by the general public, and it is still generally underestimated . . . partly because the courts today seldom refer to it, although they continue in the same tradition.²³⁷

The work of Bernd Rüthers, Ingo Müller, Michael Stolleis and Ingeborg Maus has documented extensively the anti-positivism characteristic of Nazi Germany's judiciary, as well as its predecessor,²³⁸ and in the United States John Dawson also has shown the pre-war judicial acceptance, endorsement and widespread implementation of Germany's *Generalklauseln*, the "general clauses" that were comparable in role and nature to the French *principes généraux* which France's judiciary traditionally had rejected.²³⁹ Indeed, German judicial activism may have originated in radical theory, but, as Ingeborg Maus has emphasized, during the Weimar years that preceded Hitler's takeover, judicial activism, or anti-formalism, became the principal means for highly conservative judges to fight the Weimar legisla-

refers to the following works as forming the core of the post-war attack on positivism: Hermann Weinkauff, *Der Naturrechtsgedanke in der Rechtssprechung der Bundesgerichtshöfe*, 1960 NJW 1689 (1960); HERMANN WEINKAUFF, *RICHTERTUM UND RECHTSFINDUNG IN DEUTSCHLAND* (1952); LANGNER, *DER GEDANKE DES NATURRECHTS SEIT WEIMAR UND IN DER RECHTSSPRECHUNG DER BUNDESREPUBLIK* (1959); and Raske, *Ehescheidungen auf Grund des '48 des Ehegesetzes*, DRiZ 321 (1960). See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 448 n.12. No mention is made of Radbruch in this list, since the context is one of authors whose motives emanated from self-interest.

236. FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 409 (Tony Weir trans., 1995).

237. *Id.* at 409-10; see also Schmidt, *supra* note 133, at 11 (in Germany, "[t]he language of the code should not be construed strictly").

238. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG* *supra* note 7, at 56-57 (showing how German judges were creating law by means of the *Generalklauseln*); STOLLEIS, *supra* note 38; Maus, *supra* note 58; see also WIEACKER, *supra* note 236, at 377 (describing the post-World War I German judicial reliance on, and expansion of, the scope of *Generalklauseln* in general terms of "adapting private law to the needs of an evolving society"), 411 (further discussion of pre-1933 judicial use of *Generalklauseln*); Okko Behrends, *Von der Freirechtsbewegung zum konkreten Ordnungs- und Gestaltungsdenken*, in *RECHT UND JUSTIZ IM "DRITTEN REICH"*, 38, 45 (Ralf Dreier & Wolfgang Sellert eds., 1989) (quote from Nazi legal theorist reflecting anti-positivism). Neither the German nor the French judiciary was changed in its members when fascist régimes came to power, other than the removal of its Jewish judges. This continuity in personnel was itself a powerful element in realizing judicial methodological continuity from before Hitler's takeover to the Hitler period. German legal theory at the time of Hitler's accession to power was not without critics of the judiciary's free and frequent use of *Generalklauseln*, however. Most notable in deploring their use was Hedemann in JUSTUS WILHELM HEDEMAN, *DIE FLUCHT IN DIE GENERALKLAUSELN: EINE GEFAHR FÜR RECHT UND STAAT* (1933). While Hedemann's book attests to the existence of division and controversy over appropriate judicial methodology in the period before Hitler's takeover, it also reflects how widespread the judicial reliance on and use of *Generalklauseln* was at that time.

239. See Dawson, *The General Clauses*, *supra* note 11.

tors they despised.²⁴⁰

A striking similarity between Germany and France occurred in post-war reactions. In one sense, Germany's post-war response represents a mirror image of France's, a movement in reverse, but in both countries reactions shared an underlying tenacity to dwell on the terrain of methodology, and to refrain from challenging the fundamental assumption that the culprit for judicial injustice was to be found in methodology. Each country repudiated the particular methodological approach it believed its judiciary had practiced in its fascist period, tainting that methodology by its association with fascism and terror.²⁴¹ Thus, in Germany, when it became more generally accepted that the German judiciary had been anti-formalistic in methodology, and that much of the attack leveled against formalism had been on the part of judges hoping to exculpate their own past actions, the objections tended to switch their target from formalism to anti-formalism, but, just as in France, the debate itself continued to be argued within the framework of methodology.²⁴²

Although German legal theory had strayed well before Hitler's accession to power from the traditional civil-law reliance on codes as a guiding force preclusive of judicial law-creation, the view of the judge as restricted

240. See Maus, *supra* note 58, at 87, 91-92; see also Peter Caldwell, *Legal Positivism and Weimar Democracy*, 39 AM. J. JURIS. 273, 276 (1994) ("National Socialism did not counteract the tendency to 'deformalize' law through the use of 'general clauses' instead of specific statutes, but actually strengthened it"); accord Ott & Buob, *supra* note 234, at 91.

241. See BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7; STOLLEIS, *supra* note 39; HUBERT SCHORN, *DER RICHTER IM DRITTEN REICH* (1959); Paulson, *supra* note 36, at 315 ("the exoneration thesis [i.e., exoneration by blaming positivism for judicial injustice] has been substantially discredited").

242. The attack on positivism was not formulated solely by those who were attempting to exculpate themselves from personal responsibility. The prime counterexample was Radbruch, whose motives were unimpeachable and who had had no participation in furthering or endorsing Nazi law. His challenge to positivism on the other hand did militate in favor of exculpating from personal responsibility the members of the Nazi-era German judiciary, since his view was that they did nothing worse than follow an interpretive tradition which, in light of recent history, proved to have catastrophic potential. Professor Paulson has clarified this consequence (though not motive) of Radbruch's position. See Paulson, *supra* note 36. Paulson also notes that "[t]he Weimar legal positivists, however, were precisely those who did not come to terms with the new regime." Paulson, *supra* note 36, at 325 (emphasis added). Similarly, Ernst Fraenkel figures among those who in complete honesty and without any self-exculpatory motive decried positivism as responsible for the law's capitulation to Nazism. Fraenkel was a victim of Nazism, see FRAENKEL, *supra* note 67, at v-vii, as well as a lawyer who practiced in Germany until his emigration in 1938, defending as best he could Social Democrats, unionists and others politically persecuted by the Nazi régime. See Helmut Zenz, *Ernst Fraenkel: Rechtsanwalt und Politologe (1875-1975)*, at <http://www.obing.de/zenz/hzfraenk.htm> (last visited February 6, 2001) (copyright Helmut Zenz, 2000). The Foreword to the German re-edition in 2001 of Fraenkel's *Der Doppelstaat* also contains a most interesting overview of Fraenkel's professional life. See Alexander v. Brünneck, *Vorwort des Herausgebers zur 2. Auflage (2001)*, in ERNST FRAENKEL, *DER DOPPELSTAAT* 9 (2001). Although the English version of this book, *The Double State*, originally was a translation from the German, the new German edition is a translation backwards from the English which appeared in print in German for the first time in 1974. See *id.* at 13-18.

to mechanically applying enacted law nevertheless prevailed before inroads against it gradually appeared. The mechanical, closed-system approach²⁴³ harked back to a centuries' old mentality, in which law was a process of searching for an answer in texts, and not a process of independent ratiocination. According to Professor Whitman,

[t]raditional legal practice of the Middle Ages and early modern period left almost no room for . . . independent reasoning Legal practice was about scrupulous, self-effacing and subservient obedience to traditionally authoritative texts One did not arrive at the answer to a legal question by reasoning through its intellectual and social elements One arrived at the answer to a legal question by looking up what the Emperor Justinian had said about it, or King Francis the First, or Pope Alexander the Third Law was about finding the answer among the great authoritative figures of the past and following that answer in a spirit of near slavishness.²⁴⁴

Similarly, Professor Stein notes that in pre-Enlightenment Europe, "[t]he glossators regarded Justinian's texts as sacred and ascribed to them almost biblical authority."²⁴⁵

The Enlightenment had eroded this mentality centuries before the time we are discussing, and the transformation of the conception of law in Germany was dramatic, but German law and legal theory nevertheless retained residues of their past, some of which were altered more radically in the common-law legal world than in civil-law legal culture. Thus, when his excellent book on law in Nazi Germany was translated into English, Michael Stolleis added an introduction for the common-law reader that emphasized the mechanical, closed-system aspects of the German conception of the proper judicial role: "The function of the courts was merely to 'apply' the rules laid down in the codes."²⁴⁶ His characterization is useful in retaining the historical framework that informed legal developments in Germany and that were the backdrop against which subsequent German legal theories were formulated—what Ricœur calls the "presence of an absent thing imprinted with the mark of anteriority."²⁴⁷

Wieacker attributes the closed system view of law to Christian Wolff, remarking that Wolff's logically closed system provided the basis for several of the natural law codes and even, through his legal disciples and the Pandectists, for the German BGB and related codes:

243. This is the approach Kantorowicz referred to as *Geschlossenheitstheorie*. See, e.g., GNAEUS FLAVIUS (pseudonym for HERMANN KANTOROWICZ), *DER KAMPF UM DIE RECHTSWISSENSCHAFT* 14 (1906) [hereinafter KANTOROWICZ, *DER KAMPF*]; see also Hahlo, *supra* note 4, at 242 (the traditional view of the Code is of a seamless web that covers all cases).

244. James Q. Whitman, *Reason or Hermeticism?: A Comment*, 5 S. CAL. INTERDISC. L.J. 193, 194 (1997) (emphasis added) (referring in particular to the activity of practicing lawyers, rather than judges).

245. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 46 (1999).

246. STOLLEIS, *supra* note 39, at 1; accord, Schorn, *supra* note 7, at 27-28 (description of German judiciary as bound to enacted law).

247. PAUL RICŒUR, *LA MÉMOIRE, L'HISTOIRE, L'OUBLI* ii (2000) ("*présence d'une chose absente marquée du sceau de l'antérieur*").

However there is more to it than that: ever since his textbook was published, [German] legal scholars have believed that judicial decisions should take the form of logical application of abstract principles and general concepts with a fixed and determinate place in the system . . . the ultimate basis for decision was a synthetic legal concept which could be traced back to higher principles in a manner consonant with the system. Christian Wolff is the true father of the *Begriffsjurisprudenz* or jurisprudence of constructs which dominated the nineteenth century Pandectists from Puchta through Windscheid²⁴⁸

This understanding of the judicial function in Germany remained the view of some up to Hitler's takeover, and debates continue to flourish in Germany today as to whether judges in particular cases exceeded their mandate to interpret enacted law by straying too far from the text.²⁴⁹ On the other hand, major inroads against the view of law as a closed system from which logical deduction could provide correct answers to all legal issues were made by Jhering already in the nineteenth century, with his departure from the views of Savigny, Puchta, and Windscheid, the *Pandektentheorie* and *Begriffsjurisprudenz*, which had emphasized the role of logic in legal resolutions, and even had gone so far as to suggest a pyramidal structure of legal reasoning that Jhering was to criticize for its divorce from the realities of practice.²⁵⁰ Jhering attacked the view that all

248. WIEACKER, *supra* note 236, at 255. For a most interesting assessment of Christian Wolff as having created a new orthodoxy from the philosophical breakthrough of Leibniz, see ISAIAH BERLIN, *THE SENSE OF REALITY* 63-64 (1996) ("Presently the Wolffian movement developed into an arid orthodoxy as dry, as mechanical, scholastic and incapable of yielding truth or intellectual excitement as the scholasticism which it had itself so contemptuously and so justifiably destroyed. Then Kant performed upon it the same bold and violent operation as Leibniz and the rationalists of the seventeenth century had performed in their own day.").

249. It seems to be universally recognized in theory today in Germany that judges properly create where the enacted law does not specify an answer, but there is considerable debate as to where the appropriate lines are to be drawn, and a commonly heard complaint among legal scholars concerns excessive law-creation by the Federal Constitutional Court. See, e.g., WIEACKER, *supra* note 236, at 430 ("While the positivist judge could be blamed for adhering to his systematic and conceptual traditions and institutions at the expense of realistic solutions, the [German] courts today are more open to the reproach that they are dispensing pure equity in an unprincipled and empirical manner"). The English translation of Wieacker's book appeared in 1995, but Wieacker's last revisions to the last German edition of the book were made in 1967. See Reinhard Zimmermann, *Foreword*, in *id.* at ix. I quote Wieacker's statement about modern Germany ("the courts today") even though it dates back more than thirty years because it echoes precisely what I personally was told in 1999 by numerous German law professors in criticism of the courts' perceived excessive activism. See also WEIMAR: A JURISPRUDENCE OF CRISIS 3 (Arthus Jacobson & Bernhard Schlink eds., 2000) [hereinafter WEIMAR] (describing as one of "[t]wo events of this century [to] have left a decisive mark on the theory of the law of the state in Germany: . . . the introduction of far-reaching judicial control by the Federal Constitutional Court."); RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 476 (acceptance throughout modern Germany that judges do develop the law: "*Richterrechtsbildung*").

250. See RUDOLF VON JHERING, *DER GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (8th ed., Wissenschaftlich Buchgemeinschaft 1953) (1883); *DER KAMPF UMS RECHT* (Wien, Manz 1872); SCHERZ UND ERNST IN DER JURISPRUDENZ (Leipzig, Breitkopf und Härtel 1884). For an overview of the traditional *Begriffsjurisprudenz* in German legal theory, see *Die Begriffsjurisprudenz*, in *EINFÜHRUNG IN*

answers were obtainable from the cumulative body of enacted law, or that the judge's duty was to deduce the solution through the rigorous logic of his analysis, or that the process of legal reasoning was a mathematical-like undertaking, with a corollary promise of mathematical correctness, precision, or even the possibility of unassailable logic.²⁵¹

Hubert Schorn has explained the German reaction against judicial submission to enacted law as caused by a degradation over time of the judiciary's role vis-à-vis enacted law. Originally it involved judicial determinations of how enacted law ("Gesetz") emerged within the framework of general law and legal principles ("Recht").²⁵² This judicial function was known as "scientific positivism" ("wissenschaftlichen Positivismus"), a term coined by Wieacker.²⁵³ This concept degenerated into meaninglessness, however, as a super-abundance of laws were enacted with ever more specific directives that essentially deprived judges of the important role envisaged in judicial "scientific positivism."²⁵⁴ Thus, the legislature progressively reduced the judiciary's task of ensuring that legislative enactments were applied in the manner the judiciary determined to fit with the general legal framework, for "scientific positivism" allotted to the judge the decision of how to apply statutes in accordance with legislative intent, since the latter could be harmonized only by consistency in the interpretation of enacted laws, and between enacted law and the overall framework of law as determined by judges.

According to Schorn, German judicial positivism evolved from Wieacker's "scientific positivism" to "enacted-law/statutory positivism" ("Gesetzespositivismus").²⁵⁵ The proliferation of legislatively domineering statutes, combined with the ever-reduced role of the judiciary, in turn led to a theoretical revolt against judicial bondage to legislative enactment.²⁵⁶ Jhering led this revolt in works such as *Zwecktheorie* and *Scherz und Ernst*

RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART 140-45 (A. Kaufmann & W. Hassemer eds., 1994). On the pyramidal structure mentioned above, see WIEACKER, *supra* note 236, at 345, also explaining the key concept of nineteenth-century German legal science as a gaplessness of law. See *id.* at 344-345 n.14. For the concept-pyramid ("Begriffspyramid"), see GEORG FRIEDRICH PUCHTA, *CURSUS DER INSTITUTIONEN* (Leipzig, Breitkopf und Härtel 1841).

251. See JHERING, *supra* note 250; *Pandectism and Positive Legal Science*, in WIEACKER, *supra* note 236, at 341-62.

252. See SCHORN, *supra* note 7, at 27.

253. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDER BERÜCHSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG* 271 (1952), *quoted in* SCHORN, *supra* note 7, at 27.

254. See SCHORN, *supra* note 7, at 28.

255. See *id.*

256. Unfortunately, Schorn's discussion of pre-Nazi judicial methodology omits reference to the Free Law School, and therefore does not deal with the debate as how it related to Nazi legal theory and practice. By omitting discussion of the Free Law School, Schorn also avoids the need to question his rendition of Nazi judicial practice as purely positivistic. Indeed, his sole references to non-positivistic judicial actions are to German judges who resisted Nazi dictates, rather than to the non-positivistic methodology of judges far more typically furthering Nazi ideology in violation of laws that had been enacted before Hitler's accession to power, but that, not having been repealed, remained the law. I have used Schorn's work principally with respect to the pre-Nazi era as, for reasons explained *supra* note 58, I disagree with his rendition of the Nazi period.

in der Jurisprudenz.²⁵⁷

After Jhering, the sociological school of Eugen Ehrlich and the free law school of Kantorowicz continued to develop concepts that rejected a minor, merely mechanical role for the judiciary. According to Ingeborg Maus, however, legal positivism in Germany never had meant that the judge was a mere automaton.²⁵⁸ According to Maus, the characterization of positivism as reserving a purely mechanical role for the judiciary was a caricature of legal positivism invented by the German free law movement.²⁵⁹

In a recent publication, Professors Jacobson and Schlink trace the German tradition of legal positivism by focusing on Laband, Gerber and Jelinek.²⁶⁰ The concept Weiacker articulated as "scientific positivism," Jacobson and Schlink call "*Rechtspositivismus*," a legal positivism oriented to fidelity to the abstract, overall concept of law, as opposed merely to the text of enacted law. Unlike Maus, however, but like Schorn, Jacobson and Schlink agree that German legal positivism did transmogrify into a positivism that bound the judge to the written text, a "*gesetzespositivismus*."²⁶¹ Even before the *Gesetzespositivismus* proponents, such positivists as Laband and Gerber portrayed the statutory law as gapless and closed.²⁶²

Ehrlich, like Kantorowicz, and like Gény in France, rejected such literalism, or what Ehrlich called "legal technicalism," in the judicial approach to interpreting textual law.²⁶³ Like Kantorowicz and Gény, Ehrlich believed in the inevitability of gaps in enacted law, and in the equal inevitability of judicial discretion. According to Ehrlich, where legal technicalism prevails as the official governing legal methodology, with its accompanying illusion of gapless enacted law, judicial discretion not only persists, but tends to degenerate into arbitrariness, precisely because the discretionary processes must be covert.²⁶⁴ Ehrlich's insight was very close to Professor Merryman's evaluation that in France the net effect of the enduring mythology that judicial discretion is unnecessary and contrary to the appropriate role of the judiciary, has not been to diminish the extent of judicial discretion or real power, but merely has been to lower the quality of the judiciary.²⁶⁵

For both Ehrlich and Kantorowicz, part of the point of acknowledging the inevitability of judicial discretion was to understand the available tools for constructing the future in a realistic fashion. An unwarranted focus of legal attention on enacted law thus distracted attention from what both Ehrlich and Kantorowicz viewed as more critical to maximizing the

257. See *supra* note 251 and surrounding text.

258. See Maus, *supra* note 58, at 84.

259. *Id.*

260. See WEIMAR, *supra* note 249, at 16.

261. *Id.* at 17.

262. See Stefan Korisky, *The Shattering of Methods in Late Wilhelmine Germany*, in WEIMAR, *supra* note 249, at 42-43.

263. Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, in SCIENCE OF LEGAL METHOD 63 (Ernest Bruncken & Layton B. Register trans., 1969) (1917).

264. See Ehrlich, *Judicial Freedom*, *supra* note 263, at 63.

265. See Merryman, *The French Deviation*, *supra* note 38.

chances of enduring justice: namely, the need for excellence in judges. Thus, Kantorowicz wrote that judges "[o]f course [must be] only the best judges,"²⁶⁶ and Ehrlich wrote that the sole guarantee of justice lay in the "personality of the judge"²⁶⁷ and that judges had to be "far above the common average" in both character and intelligence.²⁶⁸

Indeed, free law not only was inextricably bound to the high quality of the judge, but the latter was central to the viability of justice:

Every species of legal science, consciously or unconsciously, tends to progress through the formulated law beyond the formulated law. The difference between free decision and technical decision is therefore not so much that the former may go beyond the statute, but lies rather in the manner of doing so. For the technical method requires that its work of art be achieved only by means of certain devices of legal thinking from which no variation must be permitted; while free decision counts also upon the element of creative thought by great individual minds.²⁶⁹

Ehrlich saw in France's *Cour de cassation* an illustrative example of how judicial technicalism does not and cannot prevent a court from infusing its own ideas into a legal system even where technicalism is the mandated judicial methodology, because legislatures are not able to control how law is applied, no matter the mandated methodological approach.²⁷⁰ Habermas has discussed this issue in terms of "the Aristotelian insight that no rule is able to regulate its own application."²⁷¹

2. The Free Law School

The free law school merits attention in this context for at least two reasons. First, by 1906, it had formulated a legal theory that encouraged judicial weighing of values, and judicial power to balance inchoate values in a non-positivistic fashion, although it never advocated freedom of judges to contradict legislative enactments, focusing only on the space between those enactments, the areas of law that the legislature had not covered.²⁷²

The second reason that free law merits study is the post-war blaming of free law for allegedly having paved the way, if not for having directly led, to Nazi legal theory and practice. Once positivism had been debunked as the cause of German judicial terror, free law came under attack for having stood *against* positivism from the beginning of the century. Free law

266. Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1244 (1934) [hereinafter Kantorowicz, *Some Rationalism*]; see also KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 42-45; Ehrlich, *supra* note 263, at 74 ("The principle of free decision is really not concerned with the substance of the law, but with the proper selection of judges.").

267. Ehrlich, *supra* note 263, at 65-66.

268. *Id.* One can discern some echoes of this view in Dworkin's envisaged judge, but many distinctions persist, perhaps most notably Dworkin's sense of law as gapless and his conceiving of the judge's role as not including law creation. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

269. Ehrlich, *supra* note 263, at 73 (emphasis removed).

270. See *id.* at 70.

271. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 18, at 199.

272. See Kantorowicz, *Some Rationalism*, *supra* note 266, at 1241.

remains a target of attack today, with recent scholarly portrayals of its alleged links to Nazism coming from both the United States and Germany.²⁷³

The attacks against free law illuminate the ease with which chronological sequence and historical proximity can be confused with causality, as well as the equally unfortunate ease with which the theory has been, and continues to be, blamed for the selectively biased and politically motivated distortions that Nazi legal theorists gave of free law.²⁷⁴ After the post-war switch in target, the free law school also came under attack for having advocated just the sort of “hazy” and “flexible” judicial approach that the French courts had disliked and faithfully resisted, but that the German courts had embraced.²⁷⁵

Although far from being a positivist, Kantorowicz in fact also was far from agreeing with the rabid *anti-positivism* of Nazi legal theory, nor was his opposition to positivism based on the same grounds for which Nazi legal theorists such as Schmitt and Larenz opposed positivism. Nazi theorists (including Schmitt well back into pre-Nazi times) associated positivism with *individualism*, a primary hallmark of the liberal political state to which they were opposed.²⁷⁶ They thus viewed judicial positivism as a decadent approach to law that neglected the community interest by purporting to apply neutral legal principles based on the governing legal texts.²⁷⁷ The better judicial approach, according to Schmitt and Larenz, was to evaluate the individual's claims under law with respect to how the

273. See *infra* notes 295-320 and surrounding text.

274. One such rendition is quoted in Okko Behrends, *Von der Freirechtsbewegung zum konkreten Ordnungs- und Gestaltungsdenken*, in *RECHT UND JUSTIZ IM “DRITTEN REICH”* 38, 43 (Ralf Dreier & Wolfgang Sellert eds., 1989). It distorts free law, but is reprinted in a context that suggests it to be a legitimate representation of free law.

275. See *supra* note 185; *infra* notes 321-92 and surrounding text.

276. See CARL SCHMITT, *ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS* 44 (1934) [hereinafter SCHMITT, *ÜBER DIE DREI ARTEN*]. Schmitt's criticism of legal positivism is extremely interesting inasmuch as he deftly underscored the dilemma inherent in judicial decision-making. Paradoxically, his analysis implies the illusory nature of the closed-system (*Geschlossenheit*) theory Kantorowicz also sought to debunk, yet Nazi legal theorists advocated *Geschlossenheit*, since an entirely self-referential system facilitated Nazism. See Ernst Rudolf Huber, *Die Einheit des Staatsgewalt*, 15 *DEUTSCHE JURISTENZEITUNG* 950, 950 (1934); SCHMITT, *NATIONALSOZIALISMUS UND VÖLKERRECHT*, *supra* note 104, at 18 (defining law (“*Recht*”) as a closed, self-contained system). While, as noted above, Schmitt principally took aim at positivism for furthering individualism, he also criticized it by associating it with the Versailles peace treaty. See *id.* at 12. Schmitt also rejected positivism as a Jewish outlook, associating it with the Talmudic emphasis on the letter of the law. This criticism involves ignoring the line of thinkers, both Jewish and non-Jewish, who followed Spinoza's rejection of such literal legalism three centuries before the time in which Schmitt wrote, and which, among others, was the inspiration for the Reform Movement within Judaism. See, e.g., BARUCH SPINOZA, *THE ETHICS OF SPINOZA: THE ROAD TO INNER FREEDOM* (Dagobert D. Runes ed., 1995). For an excellent discussion of Schmitt's anti-formalism, see WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* (1999).

277. See SCHMITT, *ÜBER DIE DREI ARTEN* *supra* note 276; Carl Schmitt, *Neutralität und Neutralisierungen*, in *POSITIONEN UND BEGRIFFE: IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES 1923-1939*, *supra* note 191.

result would affect the society as a whole (a society defined in terms of an ethnically homogeneous *Volk*).

It should be noted that anti-positivism by no means saw abstract normative principles as the desirable alternative to positivism.²⁷⁸ Carl Schmitt railed against abstract normativism ("*abstrakten Normativismus*"), attributing its origins to Roman law that he characterized as alien to the Germanic law it had supplanted.²⁷⁹ His opposition to the normative, with its goal of neutrality, is that norms ultimately tend to be used against the political leader, whether a king or "*Führer*."²⁸⁰ The alternative which Schmitt, Larenz and other Nazi legal theorists advocated was a "concrete legal order."²⁸¹

Kantorowicz's differences with positivism, on the other hand, were with what he viewed largely as a flaw of tunnel vision, as well as with positivism's rejection of aspects of natural-law theory that had validity.²⁸² He took care to emphasize, however, also the value and needed contributions of positivism.²⁸³ It should be remembered that Kantorowicz never abandoned entirely his faith in neutral, objective principles, but his highly nuanced appreciation of cultural, chronological and social fluctuations yielded the idea of *objective* validity without *universal* validity: "[T]he objective validity of . . . values does not necessarily imply their universality, i.e., their equally obligatory character for everybody."²⁸⁴ No phrase captures Kantorowicz's subtle blend quite as well as Arnold Brecht's characteriza-

278. SCHMITT, *ÜBER DIE DREI ARTEN*, *supra* note 276, at 10 *et seq.*, 42 (1934). Schmitt also saw normativism as compatible with, and characteristic of, positivism. *See id.* at 32, 36.

279. A most interesting fact pointed out by Ernst Fraenkel is that Italian fascism exalted and identified with Roman law in contrast to Nazi condemnation of Roman law. *See* FRAENKEL, *supra* note 67, at 112. In her meticulous study of the University of Berlin's law faculty during the Nazi period, von Lösche notes that Roman law continued to be included in the law school's curriculum, but was "reformed" in accordance with the new, negative view of it. *See* VON LÖSCHE, *supra* note 95, at 296, 391.

280. *See* SCHMITT, *ÜBER DIE DREI ARTEN*, *supra* note 276, at 15. Much of this book is an attack on the positivism espoused by Kelsen. On Schmitt's view of normativism as a Jewish attribute, *see* Carl Schmitt, *Nationalsozialistisches Rechtsdenken*, 4 DEUTSCHES RECHT 225-29 (1934).

281. An analysis of the "concrete legal order" advocated by the Nazis is beyond the scope of this paper. Schmitt describes his concept of it in detail in SCHMITT, *ÜBER DIE DREI ARTEN*, *supra* note 276. A more comprehensive overview of the concept as expressed also by other Nazi legal theorists, is in RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7; and in FRAENKEL, *supra* note 67, at 142-47. The concept seems to me to be plagued by the same inherent paradox as the concept of *Volk*, discussed *supra* notes 94 to 108 and surrounding text; *infra* notes 349-62, 393-98 and surrounding text, in which a series of terms all become synonymous with the person of the *Führer* by virtue of their "Nazi definitions," necessarily nullifying the possibility of any meaning to the term beyond that of the *Führer*'s personal will.

282. *See* KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 10.

283. *See id.* at 10.

284. Hermann U. Kantorowicz & Edwin W. Patterson, *Legal Science—A Summary of Its Methodology*, 28 COLUM. L. REV. 679, 684 (1928). In this, Eugen Ehrlich concurred: "No rule is just for all times. Every form of justice, like all formulated law, is the outcome of historical development." Ehrlich, *supra* note 263, at 72.

tion of Kantorowicz's free law as "neutral relativism."²⁸⁵

Kantorowicz evaluated legal positivism, as he did all other legal theory, in its historical context, and believed that it had offered a needed remedy in the nineteenth century to natural law's mistaken faith in the possibility of legal perfection, and especially to the natural-law illusion of the possibility of preserving law in timeless stasis.²⁸⁶ While a necessary corrective to natural law's excessive promises, positivism nevertheless was flawed in Kantorowicz's view precisely by its failure to acknowledge the kernel of validity that Kantorowicz associated with natural law's value neutrality. More specifically, Kantorowicz, who viewed free law as an alternative to state power,²⁸⁷ saw a similarly vital alternative in natural law.²⁸⁸ Kantorowicz even suggested that free law was natural law's modern heir. Consistently with his sensitivity to law as a fluctuating social phenomenon, he described free law as "natural law [but] of the twentieth century. . .,"²⁸⁹ in other words, as transformed into something novel in its contemporaneous form.

Perhaps the greatest difference among all the many crucial differences between free law theory and Nazi legal theory is the unpretentious posture of free law. Kantorowicz did not believe in the total or absolute nature of solutions, and, therefore, offered free law as a partial solution, a useful point of departure, but never pretended to provide a total resolution to the dilemma of judicial decision-making, either in theory or in practice. Just as he had disputed the view that adherence to enacted law could solve all cases in practice,²⁹⁰ Kantorowicz saw that it was impossible for every imaginable legal problem to have a solution, for any theory to be able to cover all cases and all legal problems.²⁹¹ He extended the inherent imperfectability of theory to all other fields of intellectual endeavor, including mathematics, and urged that it was logically untenable and indeed incoherent to suppose that law *could* be totally consistent and harmonious internally.²⁹² He chided law for being the only field other than religion to maintain pretensions to complete internal coherence and logical infallibility, and indeed, saw the task of the twentieth-century legal theorist as the removal of this

285. Arnold Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811, 824-25 (1941).

286. See KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 10.

287. See *id.* at 10-11; HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* 15 (Octagon Books, 1980) (1959) [hereinafter KANTOROWICZ, *THE DEFINITION OF LAW*].

288. See KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 10-11.

289. *Id.* at 12 ("Unser freies Recht also ist Naturrecht B des 20. Jahrhunderts").

290. To this extent, he and Schmitt were in agreement. See CARL SCHMITT, *GESTZ UND URTEIL* (1912).

291. KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 17 ("In keiner theoretischen, in keiner praktischen Wissenschaft besteht die Ansicht, daß sie imstande sein könnte, geschweige denn schon jetzt imstande wäre, jedes erdenkliche Problem lösen zu können").

292. See *id.* at 16-19. I have pointed out elsewhere how Kantorowicz's outlook anticipated one of the central theses Isaiah Berlin was to expound throughout his life: namely, that not all good things are mutually reconcilable, and that the frequent supposition that they are is not only untrue, but also incoherent. See Vivian Grosswald Curran, *Rethinking Hermann Ulrich Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 66 (Annelise Riles ed., 2001) [hereinafter Curran, *Rethinking Kantorowicz*].

theological component from law and legal theory.²⁹³ Despite the fundamentally incompatible nature of Kantorowicz's outlook with the Nazi belief that, properly viewed, the *Führerprinzip* and the "total state" did provide a total solution to the dilemma of judicial decisionism, Kantorowicz and free law have continued to bear blame for leading to Nazi judicial theory.²⁹⁴

A common post-war misrepresentation of the free law school is that it advocates judicial disregard of statutory law. Thus, in reference to Kantorowicz's 1906 book, *Der Kampf um die Rechtswissenschaft*, which set forth his free law theory, Franz Wieacker wrote that "[t]he *Freirechtsschule* [the free law school] . . . did deny . . . that the judge was bound to the statute."²⁹⁵ Kantorowicz, however, emphatically did *not* advocate judicial disregard of enacted law. The scope of judicial freedom advocated by the free law school was constricted to the interstices that enacted law failed to address, a freedom to form rules only "whenever the formal law has a gap."²⁹⁶ Moreover, he stated expressly that "[t]he law is not what the courts administer but the courts are the institutions which administer the law."²⁹⁷ These pronouncements made by Kantorowicz toward the end of his life restated those he had expressed in the 1906 book that first propelled him and his free law theory to fame.²⁹⁸

Nevertheless, as recently as 1989, the German legal scholar Okko Behrends suggests that the German judiciary's sense of entitlement to disregard enacted law is attributable to the free law school.²⁹⁹ Behrends places considerable responsibility for Nazi judicial abuse on the free law school. While stopping short of attributing Nazi views to the free law school theorists, Behrends portrays the movement as a direct intellectual antecedent of Nazi legal theory.³⁰⁰ Thus, Behrends does not view Kantorowicz and his free law colleagues as espousing Nazi beliefs, but he accuses them of enabling Nazi courts to operate as they did, by means of endowing the judge with absolute power, making him a king, a "*Richterkönig*."³⁰¹

Among others, Behrends refers to a Nazi legal theorist who formerly

293. See KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 18-19.

294. See Caldwell, *supra* note 240, at 274 (how post-war German legal discourse typically berated free law theory); Behrends, *supra* note 238, at 34-79; Stephen J. Lubben, *Chief Justice Traynor's Contract Jurisprudence and the Free Law Dilemma: Nazism, the Judiciary, and California's Contract Law*, 7. S. CAL. INTERDISC. L.J. 81 (1998).

295. WIEACKER, *supra* note 236, at 457.

296. Kantorowicz, *Some Rationalism*, *supra* note 266, at 1244. It is interesting and refreshing to note that Max Weber understood how limited Kantorowicz's departures from traditional civil-law were. For Weber's accurate and fair depiction of Kantorowicz's theory, see Max Weber, *Diskussionsrede zu dem Vortrag von H. Kantorowicz 'Rechtswissenschaft und Soziologie'*, in WEIMAR, *supra* note 249, at 50-52.

297. Kantorowicz, *Some Rationalism*, *supra* note 266, at 1250.

298. See KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 14 (free law's function is to fill in the gaps of enacted law).

299. See Behrends, *supra* note 238. For a more nuanced assessment of free law's contribution to judicial discretion in Germany before Hitler's takeover, see Hans Kelsen, *Juristischer Formalismus und reine Rechtslehre*, 23 JURISTISCHE WOCHENSCHRIFT 1723-26 (1929), translated in WEIMAR, *supra* note 249, at 82.

300. See Behrends, *supra* note 238, at 34-79.

301. See *id.* at 41.

had been a free law school adherent,³⁰² and to a Nazi legal theorist who praised free law.³⁰³ Behrends concludes that free law theorists did not comprehend the complexity of judicial decision-making, that free law was intellectually immature, quasi-religious and Romanticist in its unreflective and unmerited faith in judges.³⁰⁴

On the contrary, the free law school movement reflected a highly sophisticated appreciation of the complexities of judicial decision-making, and of the mutually interactive dynamic between judicial discretion and enacted law. Kantorowicz explicitly and repeatedly expressed that it was only within the confines of statutory gaps that such discretion was both inevitable and beneficial where the selection of judges rigorously maintained excellence in the individuals chosen.³⁰⁵ Contrary to his accusers' rendition of his theory, Kantorowicz did not advocate inserting subjective judicial feelings into the gaps of enacted law.³⁰⁶ Rather, as I have argued elsewhere, "he signaled the limits of logic, which informed free law but did not define it."³⁰⁷ Nor did Nazism exalt the judge. As will be seen below, the *Führer* usurped the role of the judge.³⁰⁸

The tragedy of Nazism was not in lax rules of judicial methodology. Nor did Nazism constitute anything remotely approaching a fulfillment of free law theory. Rather, free law theory understood that no textual strictures could ensure justice. In the fluid and precarious space that judges occupy, free law set forth basic social standards and acknowledged the importance and inevitability of judicial influence. The Nazi judiciary stepped into that fluid and precarious space and betrayed the ideals Kantorowicz and Ehrlich called upon the judiciary to uphold. Nor did free law address the issue of enacted law that is evil. It can be reproached legitimately neither for the atrocities that Nazi legal theorists and judges committed with respect to the crude ideological abuses of judicial discretion which they advocated, enabled and practiced, nor for Hitler's promulgation of enacted law that violated fundamental tenets of justice.

It will perhaps be a particular irony for a reader from a common-law legal system that Behrends reproaches as leading to Nazi legal adjudication a characteristic of free law that also historically has been the very hallmark of common-law legal systems: namely, that free law advocated an inductive, rather than a deductive, approach, emphasizing life experience in contrast to the traditional civil-law process of deductive reasoning from an abstract

302. *Id.* at 36. For a critical assessment of free law, even before his Nazi period, see CARL SCHMITT, *GESETZ UND URTEIL: EINE UNTERSUCHUNG ZUM PROBLEM DES RECHTS* (1912).

303. *Id.* at 43.

304. *Id.* at 44.

305. See Kantorowicz, *Some Rationalism*, *supra* note 266; KANTOROWICZ, *DER KAMPF*, *supra* note 243.

306. See Curran, *Rethinking Kantorowicz*, *supra* note 292.

307. *Id.*

308. See *infra* notes 349-62, 393-98; see also FRAENKEL, *supra* note 67, at 124 *et seq.*

normative proposition to the particular case at bar.³⁰⁹ Such a judicial approach may span the common law to free law to the Nazi legal outlook, but, while present in all three, was not causally implicated in Nazi judicial abuse.³¹⁰

Finally, Behrends believes that Kantorowicz not only created a mythology of the judge (*"eine Richtermythologie"*),³¹¹ but also that Kantorowicz's theory represented a total surrender to the power and will of the State.³¹² This last accusation is irreconcilable with Kantorowicz's expressed views, for in free law Kantorowicz was developing what he saw as an *alternative* to state power, and it was precisely the search for such an alternative that seemed compellingly important to Kantorowicz.³¹³

309. See Behrends, *supra* note 238, at 50; cf. 1851 report to the Massachusetts legislature by Benjamin Curtis, *quoted in* Hahlo, *supra* note 4, at 256 ("From the days when Mr. Locke created a constitution down to the production of the last Code which came out of the closet of the last professor, we believe one important lesson has been taught: that all law should be derived, not created; deduced by experience and careful observation from the existing usages, habits and wants of men, and not spun out of the brains even of the most learned").

See also Curran, *Romantic Common Law*, *supra* note 12, for further discussion of this contrast between the common and civil-law legal systems. For my overall assessment of Kantorowicz as far closer to traditional civil-law legal theory than the American realists whom he had inspired, see Curran, *Rethinking Kantorowicz*, *supra* 292.

310. Indeed, this attribute for which Behrends blames free law is far more potent throughout the common law than it is in free law. As I discuss in *Romantic Common Law*, *supra* note 12, and in *Rethinking Kantorowicz*, *supra* note 292, in my opinion Kantorowicz ultimately maintained a civilian perspective despite his innovative departures from traditional civil-law methodology. The blaming of a legal attribute alien to the tradition of civilian legal systems but typical of common-law legal systems as causally related to Nazism may also be seen in Behrends' condemnation of free law for exalting the judge, making him a judge-king (*"Richterkönig"*). In this context, it is interesting to note that Rudolf Schlesinger wrote of having seen in his youth as a law student and lawyer in Germany the term *Richterkönigtum* often used to describe the judge in the common law system. Schlesinger noted with humor that when he became a clerk for Judge Irving Lehman years later in New York, he truly understood the depths and reality of the concept of the judge-king. See Rudolf B. Schlesinger, *Reflections of a Migrant Lawyer*, in *DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND* 487, 488 (Marcus Lutter et al. eds., 1993). In addition to his well-known works, Schlesinger also left an unfinished autobiography that offers many striking and pertinent insights into the two legal systems as he experienced them in the period under discussion here. See RUDOLF B. SCHLESINGER, *MEMORIES* (2000). (A great debt of gratitude is owed to Ugo Mattei for arranging to have Schlesinger's extraordinarily interesting unfinished memoirs printed posthumously.)

311. Behrends, *supra* note 238, at 70.

312. *Id.*

313. See KANTOROWICZ, *DER KAMPF*, *supra* note 243; KANTOROWICZ, *THE DEFINITION OF LAW*, *supra* note 287, at 15. Interestingly, Bernd Rüthers' analysis of Nazi legal theory is that in fact Nazi theory exalted, *not* the state, but only and exclusively the Nazi perspective. BERND RÜTHERS, *ENTARTETES RECHT: RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH* 135 (1989) (*"Der Staat war nur noch ein Mittel zur Verwirklichung der NS-Weltanschauung"*). Carl Schmitt's defense of Hitler's right to murder supports Rüthers' conclusion. In *Der Führer schützt das Recht*, 15 DEUTSCHE JURISTEN-ZEITUNG 945, 947 (1934) [hereinafter Schmitt, *Der Führer schützt das Recht*], Schmitt equates state with *Volk*. (*"in einer . . . lückerlosen Legalität gefesselt"*). As will be discussed, *infra* notes 393-98 and surrounding text, since the Nazi concept of *Volk* was a sham to give unbridled and total power to the *Führer*, the concept of state was nullified correlatively. Not surprisingly, in

Behrend's assessment of free law is far from isolated, as Wieacker's evaluation makes clear,³¹⁴ and has been echoed more recently in the United States.³¹⁵ The post-war discrediting of free law illuminates how the target of attack switched from positivism to its perceived antithesis as the culprit for Nazi judicial abuses. Through the positing of unwarranted causal connections between free law and Nazism, such criticism also has tarnished the legacy of free law and its originator, Kantorowicz, a legal thinker of brilliant originality, deep understanding, and vision, who fashioned an innovative framework for a productive, constructive and humane development of law.

Free law theory did not supply the formulaic certainty that legal theory often has attempted to develop over the centuries, particularly inasmuch as Kantorowicz and Ehrlich did not tell us how to select judges who are good.³¹⁶ To criticize free law for identifying a problem without solving it, however, in essence is to beg the question. Kantorowicz did not pretend to offer a blueprint that would ensure justice. His critics appear to confuse free law's *identification* of problems in law with the *creation* of those problems.

Perhaps most significantly, free law never succumbed to a pretension of total solutions.³¹⁷ Its critics remain unpersuasive inasmuch as they do not refute Kantorowicz's thesis that elements of flux in the judicial processes require judicial spontaneity and leeway in decision-making. Kantorowicz was not unaware of the potential for injustice when judicial discretion becomes judicial abuse, as his insistence on the need for excellent judges makes clear.³¹⁸ Rather, he signaled the need for flexibility that traditional civil-law theory denied. He outlined an approach that took the realities of legal and judicial practice into consideration, including the substantial limitations inherent in enacted law.

Free law's critics offer no remedy to the problems generated by fluidity inherent in the judicial function, and blame the theory for a course of events in the fascist period that was consistent with dangers free law signaled, but that did not result from its recommendations. It is particularly noteworthy in this context that Gustav Radbruch, who after the Second

the same essay, Schmitt emphasizes that the *Führer* has the role of judge (and judiciary). See Schmitt, *Der Führer*, *supra*, at 949.

314. See WIEACKER, *supra* note 236.

315. See Lubben, *supra* note 294, at 94-95 ("Regardless of whether or not the Free Law Movement actual[ly] advocated the methods used in National Socialist jurisprudence, the result did seem to be a logical outgrowth of the Free Law doctrine"); *id.* at 98 ("the Free Law Movement played an important part in the Nazi takeover of the German judicial system, and the Movement enabled this takeover to succeed in a way that was not possible in other fascist countries").

316. One can make a similar assessment of Rousseau, who signaled the necessity of individual excellence in legislators, but who did not elucidate a reliable process of selecting legislators. See JEAN-JACQUES ROUSSEAU, *The Legislator*, in *The Social Contract* 37-41, in *THE SOCIAL CONTRACT AND DISCOURSES* (G.D.H. Cole trans., 1950).

317. See, e.g., KANTOROWICZ, *DER KAMPF*, *supra* note 243, at 16-23.

318. In this respect, Dworkin's theory has much in common with Kantorowicz's. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) (Dworkin posits the need for herculean judges).

World War *did* formulate proposals specifically intended to remedy the problems of judicial injustice perpetrated during the fascist period, neither blamed free law theory nor repudiated its basic tenets.³¹⁹ Equally relevant, though less explicit, was Ernst Fraenkel's position. Although Fraenkel, like Radbruch, contemplated natural-law theory as a remedy for Nazi judicial injustice, he did not reproach the common post-war targets of Romanticism or the free law school, and, indeed, clearly indicated that neither Ehrlich nor the Romanticists nor the Historical School of Savigny could be associated substantively with Nazi legal theory beyond a most superficial level.³²⁰

3. Nazi Legal Thought and Practice

Kantorowicz was stripped of his job at the University of Kiel in 1933, in the first wave of firings by the new Nazi government.³²¹ After Kantorowicz's dismissal, Ernst Huber, a Nazi who had been a student of Carl Schmitt, became a law professor at Kiel.³²² Huber's 1937 publication, *Verfassung*, elucidates how incompatible Nazi legal theory was with free law theory.³²³ While free law emphasized the role of judicial decision-making as part of a dynamic between enacted law and evolving societal needs, Huber reduced all of law to the will of the *Führer*. Although that will was defined as embodying the will of the people, of the *Volk*, in Huber's writing (as in Schmitt's and in the writing of other Nazi legal theorists), the equation of the *Volk* with the *Führer's* will becomes axiomatic, nullifying any need to inquire independently into the people's will:

319. See 16 GUSTAV RADBRUCH, *GESAMTAUSGABE* 73, 77 (1988). The issue of Radbruch's post-war views is a matter of some debate. See Curran, *Rethinking Kantorowicz*, *supra* note 292. My own view is that Radbruch's views were fundamentally consistent throughout his lifetime, as were Kantorowicz's, to whom a shift in legal perspective also has been attributed by some. See *id.* Ernst Fraenkel's discussion of Radbruch supports my conclusion inasmuch as he analyzes Radbruch's espousal of natural law from before Hitler's takeover in terms that accord with Radbruch's post-war views. See FRAENKEL, *supra* note 67, at 107 (discussing GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* (1932), i.e., published before Hitler came to power). Among those who believe that Radbruch's post-war views represent a break with his pre-war legal philosophy is Rütters. See RÜTTERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 98. For the view that Radbruch's view remained essentially unchanged, see Arthur Kaufmann, *Problemgeschichte der Rechtssphilosophie*, in *EINFÜHRUNG IN RECHTSPHILOSOPHIE*, *supra* note 250, at 108-15; Monika Frommel, *Hermann Ulrich Kantorowicz: Ein Rechtstheoretiker zwischen allen Stühlen*, in *DEUTSCHE JURISTEN JÜDISCHER HERKUNFT* 631, 638 (Helmut Heinrichs et al. eds., 1993). For an overview of the German literature on this issue, see Paulson, *supra* note 36, at 320, and sources cited therein.

320. See FRAENKEL, *supra* note 67, at 142-43.

321. For the most extensive account available of Kantorowicz's life, see KARLHEINZ MUSCHELER, *HERMANN ULRICH KANTOROWICZ: EINE BIOGRAPHIE* (1984). For the first wave of 1933 firings as it affected law professors in Germany, see also Reinhard Mehring, *The Decline of Theory*, in *WEIMAR*, *supra* note 249, at 314.

322. I learned from Rütters' book that the virulently Nazi Huber had not been hired to replace Kantorowicz, as I previously had assumed. He was hired to replace Professor Schücking, another Kiel law professor dismissed at the same time as Kantorowicz. See RÜTTERS, *ENTARTETES RECHT*, *supra* note 67, at 132.

323. ERNST RUDOLF HUBER, *VERFASSUNG* (1937).

In the leader's will, [the] law achieves its external form; the will of the leader, emerging in statutes, can be nothing else but the conscious, molded form of the people's justice [völkische Gerechtigkeit] Where he has spoken, the content of the people's law has been determined with unconditional binding force.³²⁴

While Kantorowicz's optic was to enable the judge to rule as equitably as possible in the interstices of enacted law where the legislator had not chosen to speak, Huber expressed a very different idea, but one that was a fundamental verity to Nazi law; namely, the end to individual rights: "the principle of 'guarantees' has been overcome in general The people's constitution [the "people's constitution" is the name Huber gives to an allegedly unwritten constitution with which Hitler was said to have replaced the defunct Weimar constitution] . . . does not protect individuals and groups against the whole, but serves the unity and wholeness of the people against individualist and group subversion."³²⁵

Anti-individualism in repudiation of Weimar legal values was a common thread of Nazi legal writing, as was the repudiation of any legal value or source of law other than the *Führer*.³²⁶ Contrary to Kantorowicz's insistence on enacted law as the most privileged source of legal authority, Nazi legal theory explicitly rejected the authority of enacted law if it did not comport with Hitler's wishes.³²⁷ In a book that appeared in 1934, a year after Hitler's accession to power, the Nazi legal theorist Theodor Maunz rejected enacted law as a source of legal authority, in complete contradistinction to free law theory's insistence that enacted law trumped any other whenever it existed.³²⁸

Thus, in the new Nazi legal order, "the principle of legality based on statute [Gesetzmäßigkeit] has been replaced by the principle of legality based on law in general [Rechtmäßigkeit]."³²⁹ Karl Larenz agreed, declaring that judges are not to look for law in statute/enacted law ("Gesetz"), but rather in the hanging together of law according to the spirit of the *Führer*, which allegedly embodied the common will, the contemporary *Rechtswillen*.³³⁰

Finally, Kantorowicz strove to outline a framework to achieve judicial neutrality and objectivity.³³¹ He believed in the possibility of such objectivity, although not in an absolute or universal sense; in other words, as

324. HUBER, *supra* note 323, translated in WEIMAR, *supra* note 249, at 329 (emphasis added).

325. HUBER, VERFASSUNG, in WEIMAR, *supra* note 249, at 329-30.

326. For Hitler's statements against individualism, see SCHORN, *supra* note 7, at 12 (quoting TISCHGESPRÄCHEN HITLERS IN FÜHRERHAUPTQUARTIER 1941 BIS 1942, at 202 (Gerhard Ritter ed., 1951)).

327. Indeed, Kantorowicz was highly critical of American legal realism for failing to defer sufficiently to statutory law. See Kantorowicz, *Some Rationalism*, *supra* note 266.

328. THEODOR MAUNZ, GRUNDLAGEN DES VERWALTUNGSRECHTS (1934), translated in WEIMAR, *supra* note 249, at 327.

329. See *id.*

330. KARL LARENZ, DEUTSCHE RECHTSENERNEUERUNG UND RECHTSPHILOSOPHIE 36 (1934), quoted in RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG, *supra* note 7, at 276.

331. See *supra* note 285; Curran, *Rethinking Kantorowicz*, *supra* note 292.

inevitably contextual.³³² Nazi legal theory, on the other hand, rejected neutrality even as a goal.³³³ In 1940, Schmitt wrote that the sickness of European culture was in the spirit of neutrality, and that neutrality was inimical to the Third Reich.³³⁴ Similarly, Schmitt's opposition to positivism was based on positivism as an individualistic philosophy.³³⁵ Although an archenemy of Schmitt's who contributed to Schmitt's falling out with Nazi power, Reinhard Höhn also emphasized in his writing the end of individualism in the new legal order.³³⁶ Schmitt deplored the French Revolution for having ushered in an individualistic, positivistic law.³³⁷ As we will see below, Nazi legal theory eradicated legal concepts the French Revolution had introduced, principally those concerning equality and universality.

In the September-December, 2000 issue of a French historical journal, an article was published describing a book about the state of German justice from 1933 to 1936, a book which apparently survives today only in a single copy available to the public, located in the archives of the Center for Contemporary Jewish Documentation (*Centre de documentation juive contemporaine*) in Paris.³³⁸ The book was written by a German refugee lawyer in France, who wrote under the pseudonym "Timoroumenos" (Greek for "I avenge"),³³⁹ and who documented his work with extensive references to every-day legal practice in Germany under Hitler; to German newspaper articles; and to German legal journals.³⁴⁰

Timoroumenos did not address the issue of Nazi judicial decision-making in terms of positivism versus anti-positivism, but, rather, in terms of positivism versus natural law, taking the position, also seen in some more recent German legal scholarship, that Nazi law should be seen as having espoused a form of natural law in the sense of "biological

332. See *supra* note 285; Curran, *Rethinking Kantorowicz*, *supra* note 292.

333. See Carl Schmitt, *Neutralität und Neutralisierungen*, in *POSITIONEN UND BEGRIFFE: IM KAMPF MIT WEIMAR-GENEVE-VERSAILLES 1923-1939*, *supra* note 191.

334. *Id.* at 271 ("Die Krankheit der europäischen Kultur . . . ist der reichsfeindliche Geist der Neutralisierung . . .").

335. See SCHMITT, *ÜBER DIE DREI ARTEN*, *supra* note 276, at 44.

336. See Hueck, *supra* note 104, at 2.

337. See Schmitt, *supra* note 276, at 44. Isaiah Berlin has discussed Hitler's animosity to the French Revolution and his boast that he would reverse it. See ISAIAH BERLIN, *THE SENSE OF REALITY* 43 (1997). Hitler and Nazi legal theorists had German antecedents also critical of the French Revolution for excessive individualism. For nineteenth-century Prussian criticism of the *Code Napoléon* on those grounds, see AUGUST-WILHELM REHBERG, *ÜBER DEM CODE NAPOLEON UND DESSEN EINFÜHRUNG IN DEUTSCHLAND* (Hannover, Bey den Gebrüdern Hahn 1814), cited in Carbonnier, *supra* note 19, at 1350 n.13. For quoted excerpts from Hitler's speeches in which he decries individualism, see SCHORN, *supra* note 7, at 299.

338. See Ternon, *supra* note 51, at 68 [hereinafter Timoroumenos]. As I write these lines, I have not been able to obtain a copy of the book; my renditions herein consequently are "second-hand," from Ternon's account of it.

339. Since Ternon refers to the author only by his Greek pseudonym, I suspect that the author's true name has been lost to history.

340. See *id.* It is the extensive contemporaneous sources that make this book of great value, an attribute shared by Ernst Fraenkel's book, *supra* note 67.

racism.”³⁴¹ The parallels between natural law and the Nazi perspective also have been noted by Stolleis and Rüthers.³⁴² This issue was also discussed by Ernst Fraenkel in *The Dual State*, who first argued throughout most of his book that Nazism rejected traditional natural-law views, but then acknowledged an arguably natural-law component to Nazi racism, calling it “irrational Natural Law thinking.”³⁴³

We have seen the methodological continuity in the German judiciary’s approach from before Hitler to the Hitler period, despite the profound underlying alterations in substantive law that the Nazi era saw. The anti-formalist judicial approach prevalent in the Weimar era proved able, after 1933, to accommodate the new Nazi version of a natural-law perspective, such that a stable methodology implemented radical changes in the substance of German law.

Rüthers has pointed out numerous profound and irreconcilable departures from pre-Hitler German law that Nazism fashioned, starting with altering the German Civil Code’s definition of the human being as acquiring legal rights, or legal capacity (“*Rechtsfähigkeit*”), by virtue of birth, a concept which Nazi legal theorists such as Schmitt, Larenz and Siebert opposed for its failure to distinguish among those humans who in their view had a right to law’s protections from those who did not.³⁴⁴

Rüthers traces the attribution of legal capacity (“*Rechtsfähigkeit*”) to the French Revolution,³⁴⁵ noting that, for the BGB drafters, an identical *Rechtsfähigkeit* resided in all people, such that, until the Nazi period, the concept of *Rechtsfähigkeit* was equated with personhood because it emanated from, and was determined by, the event of birth.³⁴⁶ Thus, until the Nazi period, the *Rechtsfähigkeit* of the first section of the BGB could not be lost except through death.³⁴⁷ Rüthers notes that the BGB drafters considered including, but struck down as superfluous, a sentence specifying that *Rechtsfähigkeit* ends only with death, the drafters deeming it an obvious corollary of the expressly stated attribute of legal capacity’s depending only on birth.³⁴⁸

In light of the Nazis’ stripping a portion of Germany’s population of legal rights, Nazi legal theorists argued that the BGB’s original concept of

341. See Timoroumenos, *supra* note 51, at 72.

342. See STOLLEIS, *supra* note 39, at 15 (describing it as an “ethnic-national natural law”); RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 285-86.

343. FRAENKEL, *supra* note 67, at 137.

344. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 325-29.

345. See *id.* at 324.

346. *Id.* at 324-25. The ideals of the French Revolution were very much based on natural law theory. While at first blush it may seem inconsistent to describe Nazi law as natural law, the arguments of Rüthers and Timoroumenos make sense inasmuch as Nazism too was premised on absolute universals. My overall view of the extent to which one justifiably can describe Nazism as a natural-law theory is closer to Fraenkel’s, although I do not share Fraenkel’s belief either in the importance of positivism as a necessarily destructive force of law, or in the potential for natural law to have provided a remedy to the Nazi era’s judicial abuses.

347. See *id.* at 325.

348. *Id.* at 325 n.6.

Rechtsfähigkeit was not in keeping with the spirit of the German Volk.³⁴⁹ According to Larenz and Wolf, in the perspective that others have dubbed as a version or perversion of natural law, the guiding principles of German law had become blood and race, and the concept of *Rechtsfähigkeit* had to be understood in accordance with them.³⁵⁰ Thus, the criterion for legal rights or capacity became membership in the Nazi-defined Volk.³⁵¹ Rüthers quotes Siebert for the proposition that “the abstract concept of ‘person’ or ‘legal person’ has become worthless [for Nazi law].”³⁵² Even more explicitly, Larenz stated that he who was not a member of the Volk stood outside of the law.³⁵³

This new foundation might have seemed problematic to German judges, since Hitler had not repealed the BGB. The solution Nazi judges developed was to implement the new legal theory by analogizing Jewish people to the dead, such that the concepts of equality and universality of *Rechtsfähigkeit* could be honored in name, but, since even the BGB limited *Rechtsfähigkeit* to the living, the concept no longer was applicable to Jews.³⁵⁴ Ingo Müller referred to this as the judicial “concept of the ‘civil death’ of Jews.”³⁵⁵ In this manner, the BGB could be nazified without needing to be repealed.

Rüthers also has depicted the transformation of family law in the Nazi period from a private affair to a public one.³⁵⁶ Similarly, Timoroumenos’ book, which includes excerpts from Nazi legal publications and extensive references to daily Nazi-era case law, noted that, among others, Germans could lose the right to inherit property if they were deemed to be without “economic capacity” or without “honor.”³⁵⁷ He recounted a case in which a party’s right to inherit land from his father was nullified for lack of honor, due to his failure to denounce a brother to the authorities.³⁵⁸

Timoroumenos cited to the *Frankfurter Zeitung* of November 17, 1935, which published a declaration of the National Socialist Legal University of the Reich to the effect that National-Socialist jurists had to reject abstract concepts pursuant to which all people are deemed equal, and that they had to emphasize differences among people of different races.³⁵⁹ Similarly, in

349. See *id.* at 328.

350. See LARENZ, *DEUTSCHE RECHTSENERNEUERUNG*, *supra* note 104, at 39 *et seq.*; Erich Wolf, *Das Rechtsideal des nationalsozialistischen Staats*, 28 ARSP 360 (1934/35), cited in RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 328.

351. See *id.* at 329.

352. Siebert, 1 DRW 23 (1936) (“Jedenfalls ist der abstrakte Begriff ‘Mensch’ oder ‘Rechtsperson’ für uns wertlos geworden”), quoted in RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 329.

353. KARL LARENZ, *GRUNDFRAGEN* 241 (1940), quoted in RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 331.

354. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 332; Rüthers, *Schwierigkeiten mit der Geschichte*, *supra* note 1, at 184.

355. MÜLLER, *supra* note 80, at 116.

356. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 330.

357. Timoroumenos *supra* note 51, at 81.

358. See *id.* at 81 (referring to JURISTISCHE WOCHENSCHRIFT 3554 (1935)).

359. Timoroumenos, *supra* note 51, at 74.

1937, Leuner wrote that "there is no equal right which is innate in the individual; there is therefore no universal transethnic Natural Law."³⁶⁰ Leuner's remarks reflect the different conclusions one can reach with respect to Nazism's relation to natural law.³⁶¹ Nazism adopted natural law principles in theorizing an absolute and immutable character to biologically determined attributes. It rejected natural law principles, however, in denying human-wide universality.³⁶²

The mechanism by which German judges nazified the effect of pre-Nazi laws frequently was by use of the "general clauses" (*Generalklauseln*) whose equivalent played no apparent role in effecting similarly fascistic results in France. An illustrative example of the two countries' traditionally different attitudes towards judicial formalism lies in the pre-war inflation cases, in which German courts had gone so far as to use *Generalklauseln* to modify concrete contractual terms in order to remedy the tremendous hardship and injustice that a formalistic interpretation would have wrought during a time of hyper-inflation.³⁶³

The German courts of the 1920's were using their *Generalklauseln* to fashion a judicial tradition that would continue under Hitler. By contrast, the French courts of the 1920's were refusing to apply their equivalent method, their general principles, or *principes généraux*, even at the cost of leaving contracts meaningless and oppressive because of hyperinflation.³⁶⁴ Characteristically, the French courts retained the shibboleth that "a franc is a franc" ("*un franc est un franc*") in the exact quantity specified in the relevant contract, and never more nor less than that.³⁶⁵ In so choosing, France's courts continued the long-standing formalistic approach that they also would pursue uninterrupted during the Vichy years.³⁶⁶

360. LEUNER, *JUGEND UND RECHT* 49 (1937), *quoted and translated in* FRAENKEL, *supra* note 67, at 110.

361. A similarly debatable stance can be seen in Montesquieu's theory in *The Spirit of Laws*. See CHARLES-LOUIS DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1748).

362. Carl Schmitt's pre-Hitler book, *THE CONCEPT OF THE POLITICAL*, published in 1932, already rejects the validity of universals that extend to all of humanity, and emphasizes the need to ignore the individual and focus on the political in assessing the enemy (defined as the "different" and the "alien"). See SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 70, at 33.

363. See Dawson, *Specific Performance*, *supra* note 38; RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 213 *et seq.*

364. For a history of the French judicial refusal to alter contract terms, see generally Section III, *La révision du contrat*, in JACQUES FLOUR & JEAN-LUC AUBERT, *LES OBLIGATIONS: SOURCES. L'ACTE JURIDIQUE* (1988).

365. See generally FLOUR & AUBERT, *supra* note 364. Despite the post-war movement away from judicial positivism, Professor Terré notes that French courts still do not interfere with references to numbers in enacted law. See TERRÉ, *supra* note 57, at 250.

366. In 1857 the *Cour de cassation* refused to alter the terms of a contract dating back to the sixteenth century in *Canal de Craponne*, declaring that, pursuant to Article 1134 of France's Civil Code, it was not within the province of the courts to alter the agreement of parties by considering time and circumstances. See FLOUR & AUBERT, *supra* note 364, at 329. The inflationary period after the First World War saw cases arising in France similar to those in Germany, due to the "dizzying rise in prices" ("*la hausse vertigineuse des prix*"). *Id.* at 332. Flour and Aubert comment that, while one might have thought that this situation would have caused the supreme court to change its position, it held fast in

The German courts' anti-formalism by means of general clauses was due to their "*Rechtsgefühl*," their feeling that, in fairness, the law should not allow parties to get unexpected and unmerited windfalls.³⁶⁷ In the pre-Hitler 1920's, when the German courts faced the issue of whether "a Mark equals a Mark" ("*das Problem 'Mark' gleich 'Mark'*"),³⁶⁸ enforcing numerically expressed values would have wrought extreme havoc on parties, since debtors could pay off their debt in technical compliance with the amounts specified in the contract by using a Mark so devalued as to nullify the substantive significance of their performance.³⁶⁹

Rüthers points out that the judicial acceptance of this height of anti-formalism also was attributable to the fact that the German legislature had remained silent and inactive, essentially refusing to enact remedial measures to counter some of the worst consequences of the hyper-inflation.³⁷⁰ By contrast, in France, the *Cour de cassation*'s refusal to engage in contract alteration did meet with legislative response to ameliorate the situation.³⁷¹

Rüthers suggests that one can view the Nazi judiciary's perpetuation of anti-formalism, not so much as a perpetuation of general reliance on the *Generalklauseln*, but as characterized by the fashioning of a new *Gerneral-klausel*, this one unwritten and designed to avoid all conflict between the abstract idea of law and the texts of enacted law.³⁷² Thus, the unwritten addition to the existing, written general clauses would be that enacted law ("*Gesetz*") was valid and demanded formalistic judicial adherence if, but only if, it was not contrary to the *Volk*'s sense of law ("*die Recht-süberzeugung des Volkes*").³⁷³

The judicial methodology that emerged in Nazi Germany had a binary structure, which Arthur Kaufmann has called a "two-track strategy," and Rüthers has called "methodological dualism" ("*Methodendualismus*").³⁷⁴ The strategy, which Professor Kaufmann charitably calls "pragmatic,"³⁷⁵ might also be considered as the epitome of judicial cynicism. The courts took a positivistic approach to statutory interpretation when applying Hitler-era statutes. Conversely, judicial liberty with enacted law was deemed appropriate when judges interpreted pre-Hitler statutes.³⁷⁶

opposing any judicial revision of contract terms, and that this tradition continues. See *id.* at 329. In the area of public or administrative law, the *Conseil d'État* has in effect remedied the effects of similar contracts, and has done so since its 1916 decision in *Gaz de Bordeaux*, although it does not revise express contract terms (thus eschewing "*révision*"). Substantively, however, it provides a remedy through indemnification. See *id.* at 329-34.

367. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 70.

368. *Id.* at 64.

369. See *id.* at 56-90; Dawson, *Specific Performance*, *supra* note 38.

370. See *id.* at 76.

371. See FLOUR & AUBERT, *supra* note 364, at 328-33.

372. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 161.

373. *Id.*

374. Arthur Kaufmann, *National Socialism and German Jurisprudence from 1933-1945*, 9 CARDOZO L. REV. 1629, 1645 (1988); RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 177.

375. See Kaufmann, *supra* note 374, at 1645.

376. See *id.*; RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 176-81.

Accordingly, Larenz admonished judges to recognize and apply every enacted law ("Gesetz") that met with the *Führer's* wishes, but otherwise *not to seek law or judicial resolutions in enacted law*.³⁷⁷

Rüthers' meticulous study of German case law in the Nazi period reveals the extent to which *Generalklauseln* themselves were subject to varying substantive content,³⁷⁸ in order to deprive Jews of legal rights, both economic and other. Thus, the courts interpreted the general clause concerning good morals ("gute Sitten") so as to allow a finding that, where a party was Jewish, he or she had violated the requirement of "good morals" by dint of being a Jew.³⁷⁹ The judiciary employed similar reasoning with respect to the "*Treu und Glauben*" (loosely, "good faith") general clause, depriving Jews thereby of contractual rights.³⁸⁰

Rüthers' analysis might suggest that the *Generalklauseln* were to blame inasmuch as they were the tools the courts used in order to strip Jews of legal rights, and occasionally one has the impression that Rüthers indeed is suggesting this. In my opinion it would be incorrect to place the blame on the *Generalklauseln*, for it seems abundantly clear that, even without *Generalklauseln*, the courts would have reached the substantive result of stripping Jews of virtually all legal capacity, as the French courts were able to do without using such a mechanism.

Rüthers' study also reveals that the German courts had other means of generating substantive results to further Nazism. As we saw above, the courts became adept at novel analogies, such as the one equating Jews to the dead that eliminated BGB legal rights coterminous with life.³⁸¹ Nazi legal theory also offered the courts an efficient analogy of Jews to non-persons in terms of their legal rights, by declaring that the individual as such ceased to be a legally valid concept, except inasmuch as part of the *Volk*.³⁸² Since Jews were defined as external to the German *Volk*, the courts could conclude that they had no legal rights.³⁸³

Carl Schmitt's analysis of the *Generalklauseln* is illustrative of both the Nazi perspective and the lack of logic in condemning the legal concept of *Generalklauseln*. Schmitt wrote that he approved of the *Generalklauseln* because they could be used to further Nazi objectives.³⁸⁴ He referred to Hedemann's famous criticism of them as having been valid for the Weimar

377. LARENZ, *DEUTSCHE RECHTSTERNEUERUNG*, *supra* note 330, at 36, *quoted in* RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 276.

378. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 217.

379. See *id.*

380. *Id.* at 228-29.

381. See *supra* notes 353 to 355 and surrounding text.

382. See *supra* notes 346 to 353 and surrounding text.

383. Nazi legal theory erected a hierarchy of people with varying levels of legal capacity, depending on the proximity or remoteness to the German *Volk* of the group to which they belonged. Jews figured at the lowest rung, and were totally excluded from rights. See RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 325-36 (citing LARENZ, *DEUTSCHE RECHTSTERNEUERUNG*, *supra* note 330, at 39); LARENZ, *GRUNDFRAGEN*, *supra* note 353, at 241; Erik Wolf, *Das Rechtsideal des nationalsozialistischen Staats*, 28 ARSP 360 (1934/35); Siebert, I DRW 23 (1936).

384. SCHMITT, *ÜBER DIE DREI ARTEN*, *supra* note 276, at 57.

era but as no longer valid in the Hitler context, because the important point was that the *Generalklauseln* could be used to further contemporary aims: “[They can] achieve a new juridical attitude/way of thinking.”³⁸⁵ The Nazi practice, among both legal theorists and judges, thus was not to make use of legal concepts unless the practical purposes of Nazism could thereby be accomplished. In such a legal order, the substantive evaluation of legal concepts in terms of judicial results becomes of dubious reliability.³⁸⁶

Nazi legal academics’ rendition of the events that led to Hitler’s accession to power, or *Machtergreifung*, were greatly distorted in order to convey far greater popular acclamation than history validates.³⁸⁷ Even such arguably unwarranted claims of the legitimacy of Hitler’s accession to power, however, did not go beyond the initial legitimization of the *Führer*. The idea that the leader would be ineffably, synecdochically fused with his people, and henceforth would define the will of the people through his decisions, involves an inevitable *abandonment* of deference to that very will. Nazi legal theory officially was that the *Volk* defined the *Führer*, but the practical power hierarchies fully contemplated by legal theorists writing after Hitler’s stranglehold on political power meant that the *Führer* was to define the *Volk*, and not vice versa.³⁸⁸

385. *Id.* (“*Ich bin deshalb der Überzeugung, daß sich in diesen Generalklauseln eine neue juristische Denkweise durchsetzen kann*”); cf. FRAENKEL, *supra* note 67, at 121 (“National-Socialism substitutes a nationally restricted idea of utility for the humanistic values of Natural Law”). It should be noted that Hedemann, who famously criticized the *Generalklauseln* under Weimar, was a supporter of Nazism, and continued his successful career as a law professor under Hitler.

386. In addition to the work of Timoroumenos and Ernst Fraenkel, uniquely valuable for having been written during the Nazi period, and being based on innumerable contemporaneous aspects of Nazi legal theory and practice, a truly remarkable use of Nazi legal jurisprudence was accomplished by Raphael Lemkin. A Polish-Jewish lawyer who escaped to the West, Lemkin not only drafted the U.N. Convention on Genocide, but also coined the term “genocide” *before* learning the facts that later would substantiate his conclusion of Nazi genocidal goals. See Michael Ignatieff, *The Danger of a World Without Enemies: Lemkin’s Word*, THE NEW REPUBLIC, February 26, 2001, at 25-28. According to Ignatieff, Lemkin understood the nature of the Nazi destruction machine by a process of logical deduction *from the study of Nazi jurisprudence*. See *id.* at 26. Ignatieff stresses the contrast between many who could not bring themselves to believe what was happening, despite being privileged to the facts that compelled the conclusion of genocide (people such as Isaiah Berlin, Nahum Goldman and Chaim Weizmann), with Lemkin, who, despite *not* having access to the relevant factual information, understood the genocidal nature of the Nazi undertaking from Nazi law and legal theory.

387. See, e.g., Carl Schmitt, *Der Führer schützt das Recht*, *supra* note 313; RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 110 (Hitler referred to “legal Revolution” as resulting from spectacular popular support for his leadership); FRAENKEL, *supra* note 67, at 4 (“[t]he National-Socialist legend of the ‘legal revolution’ is contradicted by the reality of the illegal *coup d’état*”).

388. According to Timoroumenos, as recounted by Ternon, this fabrication resulted from the problem of Nazism that law by its nature limits the power of the State, a situation inimical to the *Führerprinzip*. Thus, “Nazi jurists resolved the contradiction by constructing a political abstraction, the people, but in conferring a concrete reality to this abstraction: the Führer” (“*Les juristes nazis tournent la contradiction en construisant une abstraction politique, mais en conférant à cette abstraction une réalité concrète, le Führer*”). Timoroumenos, *supra* note 51, at 72.

Thus, Schmitt wrote that law itself was defined in terms of "the objective and the will of the Führer."³⁸⁹ Nazi legal theorist Karl Larenz concurred, advocating a retroactive relation of law to pending cases, in the light of the "values of the Reich community," exemplifying "the will of the Führer."³⁹⁰ Roland Freisler, later to try and sentence to death the July 1944 conspirators against Hitler's life, wrote that, while judges were not to decide in a manner that contradicted enacted law, the measure of the validity of their decisions was the extent to which they furthered National Socialism.³⁹¹

The fascist belief that individualism was the decadent residue of Weimar (and of the French Revolution)³⁹² could justify dismissing the value of individual disagreements with the leader's decisions; nevertheless, however one differentiated the communal concept of the people from its individual constituent members, even that communal entity of necessity would remain an unknown factor in practice, so long as the *Führer* was deemed to be organically able to embody its will without needing to respond to any continuing political control exerted on its behalf as a check on the *Führer*.

IV. Conclusion

The issue of formalism and anti-formalism in the French and German judicial methodology of the fascist era first demands a lucid assessment of which category accurately describes the practices of those judiciaries. The answers depend on how one approaches the question. We have seen that the French judiciary was more formalistic in overt tradition than its German counterpart, but that its practices would allow for a characterization of lack of formalism if one considers the numerous ways in which the courts traditionally also carved out paths to reach substantive results they deemed desirable, with far less deference to enacted law than they claimed or than appeared on the surface of the texts of court decisions. On the other hand, their overt deference to the letter of textual law itself bespeaks of positivism, particularly in a system in which case precedents are not binding on future adjudication, since the purported implementation of the enacted law confirms the judiciary's duty to adhere to it.

With respect to Germany, we saw a shift in the perception of whether the courts in fact had adhered to a formalistic outlook during the Third Reich, or merely claimed after the war to have done so. A history of anti-formalism existed in the German judicial approach before Hitler's rise to power, and was related to the important role that the courts of Germany

389. FRANKFURTER GAZETTE, 7 October 1935, *quoted in* TIMOROUMENOS; see TERNON, *supra* note 51, at 73; accord Freisler, in *id.* (quoting DEUTSCHE JUSTIZ 726 (1936)) ("The laws of the Führer and the manifestations of his will are sacred and the orders of the Führer are manifestations of the will of the central and vital order of the people.").

390. KARL LARENZ, DEUTSCHE RECHTSERNEUERUNG UND RECHTSPHILOSOPHIE 32, 35 (1934), *quoted in* Maus, *supra* note 58, at 89.

391. See Roland Freisler, *Recht, Richter und Gesetz*, in 95 DEUTSCHE JUSTIZ 694 *et seq.* (1933), *quoted in* Maus, *supra* note 58, at 88-89.

392. See *supra* notes 335-37 and surrounding text.

played officially and in their self-understanding of that role as crucial to the moral life of the nation. On the other hand, a two-track system of judicial methodology coexisted in Nazi Germany, depending on whether the law to be applied was pre- or a post-Hitler law, thus allowing one to conclude that both formalism and anti-formalism were the German judicial approach.

While the contrasts between the judicial approaches of Germany and France, coupled with grave injustice in substantive results in both countries, allow one to question whether causality linked the specific methodologies to the substantive nature of case results, the uncertain role of methodology in terms of substantive outcome may be most starkly visible by the example of Germany alone. The post-war about-face from initially criticizing judicial formalism to subsequently criticizing anti-formalism, when the view that German courts had been positivistic changed to a view that they had not been positivistic, signals starkly the strength of the impetus to blame the particular methodology that had been tainted by association with Nazism, and casts doubt on the validity of the conclusion that either methodology by nature mandates injustice in substantive result.

In addition, the German judicial use of *Generalklauseln* yielded results as terrible in kind as France's judicial positivism, with its rejection of *principes généraux*, France's version of Germany's general clauses. On this basis, one might be tempted to disagree with my conclusion that methodology did not cause substantive injustice, by concluding that it did, and indeed that *both* positivistic and anti-positivistic methodologies caused judicial injustice. This, however, would be a reconceptualization of the underlying tenet of my position: namely, the accumulated evidence demonstrates that we will not be able to identify the responsible culprit for fascist-era judicial injustice in France or Germany in the methodological distinctions that separate positivism from anti-positivism, or formalism from anti-formalism.

In terms of the practical *relative* significance of positivist and anti-positivist judicial methodology to substantive outcome, the conclusion of general insignificance would be supported whether both methodologies yielded injustice, or whether neither did. In the first situation, of course, one would be concerned about a potential need to outlaw injustice-generating methodologies. To this end, one would want to explore whether the causal correlation to injustice by both methodologies was a constant throughout the time the respective judiciaries used those methodologies, a time which, we have seen, was far longer than the fascist era in both France and Germany.

The historical evidence in fact compellingly suggests otherwise: namely, both methodologies were used for substantial periods without yielding injustice in substantive outcome of an order of magnitude anywhere approaching the injustice of the Nazi-dominated judicial period. The problem of injustice, then, logically is amenable to causal correlation only with other factors. More specifically, they must be factors which were present during the particular periods of injustice in which the methodolo-

gies also happened to be coterminous with injustice, but, unlike the methodologies discussed above, they must be factors which were *not* present during eras of acceptable levels of substantive justice.

If one agrees that Europe's legal experience in the era of fascism permits one to deduce that substantively unjust judicial outcomes cannot be prevented either by engaging in or by avoiding formalistic or anti-formalistic approaches in legal methodology, one may wonder what instruction the fascist era judiciaries can offer more affirmatively for complex contemporary constitutional democracies. We have seen that the driving force behind court decisions in both Germany and France was political ideology, and that the particulars of judicial methodology were far less important to the outcomes of cases. If we can learn from the fascist era's judicial experience, it is perhaps to beware of that pervasive facet of the era that also permeated law: namely, unicity. The fascist judicial experience suggests that, even in legal methodology, judiciaries should avoid listening to one voice alone, at the risk of moving in the direction of what in Germany was called the "total State" (*der totale Staat*).

In Germany, the ideas of *Volk* as conceived by Herder and Savigny before the twentieth century had held genuine promise for a flowering of human particularity in the context of mutual respect among communities.³⁹³ For contemporary goals of maintaining cultural diversity, early

393. The issue has arisen with some frequency since the Second World War as to whether German Romanticism was responsible for the virulent turn in German nationalism under Hitler. I argue against that view in Vivian Grosswald Curran, *Herder and the Holocaust: A Debate About Difference and Determinism in the Context of Comparative Law*, in *THE HOLOCAUST'S GHOST: WRITINGS ON ART, POLITICS, LAW AND EDUCATION* (F.C. DeCoste & Bernard Schwartz eds., 2000). With respect to Savigny's idea of *Volk* in law, see FRIEDRICH CARL VON SAVIGNY, *VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 8 (Heidelberg, J.C.B. Mohr 1840); FRIEDRICH CARL VON SAVIGNY, *I SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 14 (Berlin, Veit und Comp. 1840). Moreover, Rüthers notes that the notion of legal capacity deriving from birth, and therefore being universal, was Savigny's: "Each individual person, and only the individual person, has legal capacity [*ist rechtsfähig*]." FRIEDRICH KARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* II, 2 (Berlin, Veit und Comp. 1840), *quoted in* RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 324. The Nazi legal theorists changed this root concept of Savigny's perspective. Indeed, while Herder and other Romanticists are blamed for the Nazi perversions of their concept of *Volk*, Carl Schmitt was quoting neither Herder nor Savigny, but, rather, the great French Enlightenment thinker, Montesquieu, for the connections between peoples and their laws. See *Das Postulat der Rechtsbestimmtheit*, in CARL SCHMITT, *GESETZ UND URTEIL: EINE UNTERSUCHUNG ZUM PROBLEM DER RECHTSPRAXIS* 46-47 (1912). Schmitt's concept of the *Volk* in many respects seems to emanate more from Montesquieu's than from Herder's, once again suggesting the loosest of causal connections between the views of the antecedent and those of an abusive interpreter thereof. On the other hand, *Gesetz und Urteil* was published in 1912, and the extent to which Schmitt's pre-1933 views were valid for his post-January, 1933 theory is a matter of considerable debate. My own reading of Schmitt is that, opportunism notwithstanding, a fundamental continuity of thought links all of Schmitt's works. For Herder's explicit rejection of a racial basis of *Volk*, and emphasis on the *Volk's* arising from cultural, historical and linguistic bonds, see JOHANN GOTTFRIED VON HERDER, *SÄMTLICHE WERKE* XII 107 (Bernhard Supphen ed., 1884). Herder also rejected hierarchizing different cultures. *Id.*, XVIII, at 247-248. For an excellent account of this aspect of Herder's thought, see ISAIAH BERLIN, *VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS* 163 (1976). Romanticism in and of itself did not proclaim the superiority of any one culture. With a

German theories of *Volk* may be positive and productive. Fascist legal theory nullified the concept of *Volk* that had animated Herder, Savigny and others, however, even while it purported to exalt it, inasmuch as fascist theorists allowed only for the initial legitimation of the political system through its selection of the *Führer*.³⁹⁴ In a context that rejected popular elections, the Nazi concept of *Volk* and state became one, but, in lieu of an ineffable fusion entailing communal well-being, as the theory maintained, the *Volk de facto* was at the mercy of an all-powerful, single person. This then, of necessity entailed loss of voice and vanishing of *Volk*.³⁹⁵

We may take from this history a resolve to prevent constituent elements of constitutional democracies from merging into oneness, even at a sacrifice of some efficiency. The temptation to opt for efficiency through a leveling absorption of the many into one was at the basis of Schmitt's theory, and remains a tempting option to many today in both the European Union and the United States. Schmitt argued that the will of the people, the "*Volkswille*," could not be realized if it was dispersed into various channels of expression, as where multiple parties express conflicting views, impeding political action of any kind.³⁹⁶ The flaw in his reasoning was not in his critique of the liberal pitfall of inefficiency, and its ultimate potential for political paralysis due to multiplicity. It was, rather, in equating the reduction of the many with a realization of the *Volkswille*.

The fascist theoretical conceptualization did not allow for a *Volkswille* that aspired to more than a fictitious or illusory realization. It may be, as Schmitt observed, that empowering the *Volkswille* creates momentous, sometimes insuperable, challenges where it is not channeled into a single articulation, such that multiplicity threatens to nullify its very objective. It also may be that liberalism carries by nature the paradoxical potential of degenerating into meaninglessness through an excess of proposed political

world perspective similar to that of Herder, the German Romanticist Schlegel studied and wrote about the beauty of India's culture and language. See FRIEDRICH VON SCHLEGEL, *UEBER DIE SPRACHE UND WEISHEIT DER INDIER* (Heidelberg, bei Mohr und Zimmer 1808). Moreover, as Fraenkel noted, "National-Socialism rejects the romantic view that the law can be 'discovered' if the judge immerses himself into the soul of the nation and follows traditional legal usages . . . [because] [i]t is not for the judge to determine the legal belief of the nation. That is the task of the Leader" FRAENKEL, *supra* note 67, at 124.

394. The concept of *Volk* underwent a transformation from the Weimar period to the Hitler period from an abstract idea to a concrete one. Oliver Lepsius argues compellingly that the most fundamental attribute of the new, concrete version of *Volk* was "race" or "blood," and that the new Nazi legal concept of *Volk* became the key legal concept of the Nazi era. See *Der Begriff des Volkes*, in OLIVER LEPSIUS, *DIE GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG: METHODENENTWICKLUNGEN IN DER WEIMARER REPUBLIK UND IHR VERHÄLTNISS ZUR IDEOLOGISIERUNG DER RECHTSWISSENSCHAFT IM NATIONALSOZIALISMUS* 13-49 (1994); accord Hueck, *supra* note 104.

395. Compare Carl Schmitt, complaining during the Hitler period that Germany still enjoyed too broad a freedom of the press, and advising against free expression of opinion. See Carl Schmitt, *Weiterentwicklung des totalen Staat in Deutschland (Januar 1933)*, in SCHMITT, *POSITIONEN*, *supra* note 277, at 186.

396. *Id.* at 189. For pertinent quotes from Hitler on how *Totlütät* or oneness was the essence of Nazism, see RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG*, *supra* note 7, at 101-02.

agendas, such that a large *quantity* of meanings impinges on *quality*, eventually nullifying the possibility of meaning itself.

From this, however, it cannot be deduced that the challenge of determining a viable expression of the people's will can be resolved by the elimination of multiplicity. Schmitt's solution of the "total State" thus succeeds in ridding the problem of its symptom, but does not, and cannot, resolve the problem of plural voices by silencing all but one.

Both Schmitt and Ernst Huber took the position that the Führer-state did not require separation of powers, that the concepts of *Volk* and *Volk* community signified a single, unitary and closed system of law and government.³⁹⁷ Pluralism and its corollaries of open conflict and cacophony can be eliminated by allowing for only a single expression, as where an authoritarian state eliminates rival parties and free legislative elections.³⁹⁸ The surviving residue of one, however, will bear no logically necessary connection to any authentic version of the will of the people, unless a viable process exists for the people to offer continuing information as to the nature of its will through some organism empowered to initiate change in response to ongoing indications of popular sentiment.

The modern world, far beyond the European Union and the United States, and still farther beyond the specifics of their legal orders, is challenged today by a threat of encroaching unicity. A prime example concerns the rapidity with which languages are disappearing from the earth. Recent studies show disconcerting parallels between language disappearance, often taken to be an anodyne stepping-stone to economic prosperity, and progressive biological impoverishment of the ecosystem.³⁹⁹

George Steiner has analyzed the evolutionary benefit of the profusion of mutually incomprehensible languages within small geographical areas, finding in the extremely valuable world perspective contained within each language the Darwinian explanation to an otherwise inexplicable situation.⁴⁰⁰ Hannah Arendt's last, posthumously published book addresses

397. See Schmitt, *Der Führer schützt das Recht*, *supra* note 313, at 946; Ernst Rudolf Huber, *Die Einheit der Staatsgewalt*, 15 DEUTSCHE JURISTEN-ZEITUNG 950, 950 (1934).

398. On the inherent impossibility of democracy without political parties, see Hans Kelsen, *On the Essence and Value of Democracy*, in WEIMAR, *supra* note 249, at 92 (translated and excerpted from HANS KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE* (1929)). Although Kelsen, like Schmitt, defined democracy as intrinsically separable from liberalism (see *id.* at 88), a conclusion I have difficulty in following, Kelsen's viewpoint contradicted the Nazi legal theorists' belief that democracy can persist without effective political representation through a free choice of legislators. See *id.*

399. See DANIEL NETTLE & SUZANNE ROMAINE, *VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES* (2000); CLAUDE HAGÈGE, *HALTE À LA MORT DES LANGUES* (2000); see also Dominique Simonnet, *Claude Hagège, "Une langue disparaît tous les quinze jours,"* (interview with Hagège), in L'EXPRESS, Nov. 2, 2000, at 10 (Hagège decrying the ferocious rapidity of language disappearance in our times, and claiming a loss of "human intelligence" with every loss of a language: "*Une langue qui disparaît, ce ne sont pas seulement des textes qui se perdent. C'est un pan entier de nos cultures qui tombe. Avec la langue meurt une manière de comprendre la nature, de percevoir le monde, de le mettre en mots. Avec elle disparaît une poésie, une façon de raisonner, un mode de créativité. C'est donc d'un appauvrissement de l'intelligence humaine qu'il est question.*").

400. See GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* (1998).

the “almost infinite diversity . . . [of] appearances” in the world.⁴⁰¹ She concluded that the manifest superfluity that abounds cannot be explained in traditional terms of functionality, and offered the provocative hypothesis that traditional analysis may have it backwards, such that appearances and their diversity may be more fundamental to human and animal existence and purpose than the generally privileged inside, i.e., that body may take precedence over mind, external attributes over internal organs, and diversity over sameness.⁴⁰²

On the other hand, pluralism in and of itself is not likely to be a panacea to the problem of globalization or to what sometimes appears to be the European Union’s inexorably increasing erasure of differences. In an excellent new book on customary law, Leon Sheleff writes that “[w]hether or not legal pluralism is divisive or integrative is a consequence not of its acceptance in ideological terms or of its existence in practical terms, but of the manner in which it is exercised and the content of the culture in which it is practiced.”⁴⁰³ The challenges legal pluralism poses in the context of customary law may hold much valuable instruction both for the United States and the European Union in their efforts to retain the benefits of diverse optics without betraying their goals of inclusive integrative justice. As Neil MacCormick signals in his recent book,

[t]he resources of theory need to be enhanced to help deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration. We come to the frontier of the problem of legal pluralism, and have to reflect on solutions to the difficulties for practice implicit in the very idea of pluralism.⁴⁰⁴

The fascist legal experience should not cause one to condemn unicity wholesale merely because it coincided with Nazi theory and practice. To do so would be a repetition of the mistake that post-war legal discourse engaged in when it alternately condemned both positivism and anti-positivism, in keeping with changing hindsight perceptions of their Nazi-era connections. While unicity seems more intrinsically and necessarily connected to fascist theory and practice than the particular legal methodologies discussed above, one also should remember the privileged position unicity held in Enlightenment thinking, with great humanitarian potentials.⁴⁰⁵

401. ARENDT, *LIFE OF THE MIND*, *supra* note 50, at 20.

402. *See id.* at 27-28. One wonders if Arendt’s idea was inspired by Kant. *See* CASIRER, *KANT’S LIFE AND THOUGHT*, *supra* note 25, at 245, 312 (referring to Kant’s *Foundations of the Metaphysics of Morals*).

403. LEON SHELEFF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM*, 433 (1999); *see also* BORIS CYRULNIK & EDGAR MORIN, *DIALOGUE SUR LA NATURE HUMAINE* 63 (2000) (“*unité et diversité, voilà notre double trésor*” [“unity and diversity are [humanity’s] double treasure”]).

404. MACCORMICK, *QUESTIONING SOVEREIGNTY*, *supra* note 22, at 102.

405. HORKHEIMER and Adorno do condemn the Enlightenment for its valorization of unicity, viewing the valorization of oneness indissociably part of totalitarianism and fascism, and concluding that the Enlightenment bears blame for Nazism. I do not share their view. *See* HORKHEIMER & ADORNO, *supra* note 16.

It is to be hoped that legal methodology may acquire a new sort of significance as part of a diversification paradigm. While we have seen that particular legal methodologies are unlikely to have a strong causal correlation with substantive justice or injustice, it may well be that they are useful in signaling alternatives, and in keeping the judiciary attuned to the different goals each methodology represents and symbolizes. Conversely, it may well be that a convergence of methodologies culminating in a single, homogenized legal methodology is likely to militate indirectly against justice and democracy, in accordance with Isaiah Berlin's insight that "a unified answer in human affairs is likely to be ruinous."⁴⁰⁶ Convergence need not even signify the triumph of a particular perspective over another. Loss may ensue even from a product equitably melded from disparate origins, simply because disparity has been sacrificed in the process.

In his most recent book, Clifford Geertz, commenting about a difficult case, states that he could "not see that either more ethnocentrism, more relativism, or more neutrality [in the manner in which it was resolved] would have made things any better."⁴⁰⁷ But he concludes that "more imagination might have."⁴⁰⁸ Similarly, in his discussion of the phenomenology of human culture, Ernst Cassirer noted the uniquely human ability to imagine or theorize for a future world that is not bound by past experience: "[M]an's symbolic power ventures beyond all the limits of his finite existence."⁴⁰⁹ That process is necessary to the legal realm, and requires recourse to the wealth of divergent concepts transmitted from the past, for multiplicity of conceptual resources correlates positively with creativity. In the eyes of Kant, "[c]oncepts without intuitions are empty; intuitions without concepts are blind."⁴¹⁰

406. ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 146 (1999); accord Steiner, in Jahngelbloo, *supra* note 31, at 150 ("L'universalisme n'apporte aucune valeur de tolérance ou d'accueil" ["Universalism carries no value of tolerance or receptivity"]); see also CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 230 (1995) ("The genesis of the human mind is . . . not monological . . . but dialogical"); Étienne Balibar, *Ambiguous Universality*, 7 DIFFERENCES: J. FEMINIST CULTURAL STUD. 48, 48 (1995) ("integrative patterns are not able to 'reconcile' or completely 'mediate' the conflicting concepts and experiences of universality"); cf. George Bermann, *The Discipline of Comparative Law in the United States*, 4 REVUE INTERNATIONALE DE DROIT COMPARÉ 1041, 1052 (1999) ("[i]t would be contrary to the appreciation of diversity that underlies the comparative law enterprise itself to erect a single . . . methodology as, alone, worthy of the enterprise." His argument applies beyond the confines of comparative legal analysis.).

407. CLIFFORD GEERTZ, *AVAILABLE LIGHT: ANTHROPOLOGICAL REFLECTIONS ON PHILOSOPHICAL TOPICS* 81 (2000).

408. *Id.*

409. ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* 55 (1944) [hereinafter CASSIRER, *ESSAY ON MAN*].

410. *Id.* at 56 (quoting in translation IMMANUEL KANT, *CRITIQUE OF JUDGMENT* §§ 76, 77). While it is very likely that Cassirer translated from the German without consulting a published English translation, I have tried without success to identify this quote (either verbatim or in paraphrase) in KANT'S *CRITIQUE OF JUDGEMENT* §§ 76, 77, at 313-26 (J.H. Bernard trans., 1914), although the text in those sections substantively supports the apparently quoted language. I also have not found that language (even in paraphrase) in related passages.

In Europe today, methodological pluralism has value in offering choices to the European Court of Justice, hallowed by accumulated judicial insights and perspectives, no doubt some to be rejected, but others that may well illuminate the path by enhancing judicial imagination in the future. To this end, the European Court of Justice should seek insights not just from the formalist and anti-formalist methodologies discussed above, but also from the wealth of the judicial tradition of its few common-law constituent judiciaries. Europe, after all, in embarking on the most exciting adventure of our times, and arguably also of her history, should not cease to be a locus of memory, a *lieu de mémoire*.⁴¹¹ A loss of methodological pluralism thus may be dangerous inasmuch as it would be a sacrifice of one kind of continuing cultural difference,⁴¹² of one sort of pluralism, and of a source of inspiration. Legal pluralism offers the promise of continuing vitality to the United States legal order, as it does, in a different context, to the European Union's.

This paper has dealt with the judicial methodology of French and German courts under fascism also in terms of the ever-present challenges to understanding causality in historical phenomena. Max Weber strove to define and determine causality by means of a test for the counterfactual, later incorporated into United States tort law as the "but-for" test.⁴¹³ Causality in both history and law has remained abundantly problematic, however,⁴¹⁴ as attempts to decipher causation with, among others, Weber's formula have been riddled with difficulty. In United States tort law, the counterfactual is helpless in dealing with multiple causes because Weber's method enables causes to be identified as such, but does not yield a determination of their relative causal significance.

In the final analysis, causality is inseparable from the problem of memory. As Paul Ricœur reminds us, both history and memory are fashioned from absence.⁴¹⁵ And as Proust reminds us, "the world . . . was not created once, but as often as an original artist has appeared on the scene."⁴¹⁶ Memory belongs to the future as much as to the past and present. The imprints of the past in our current reconfiguration of the events studied will determine the lessons we take from them, and in turn themselves are determined by the concerns and understandings of our own time and place that we bring to those events, sometimes purposefully, sometimes unconsciously. What is lost from the past will impoverish future

411. See LES LIEUX DE MÉMOIRE, *supra* note 19.

412. On the entrenched reluctance to see culture in laws, see Carbonnier, *supra* note 19, at 1331-32 ("*une certaine répugnance à voir dans les lois, au-delà d'un métier, une culture*").

413. See MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans, 1968); MAX WEBER, *MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES* 177-78 (Edward A. Shils & Henry A. Finch eds. & trans., 1949).

414. See generally TONY HONORÉ, *RESPONSIBILITY AND FAULT* (1999).

415. See PAUL RICOEUR, *LA MÉMOIRE, L'HISTOIRE ET L'OUBLI* (2000).

416. MARCEL PROUST, *À LA RECHERCHE DU TEMPS PERDU* 623 (2 Pléiade ed., 1987-1989) ("*le monde . . . n'a pas été créé une fois, mais aussi souvent qu'un artiste original est survenu*").

understandings, and what we transcribe of the past determines what will be lost, eventually even from memory: "[R]elying on the written word, men 'cease to exercise memory.'"⁴¹⁷

In *Les Lieux de mémoire*, Pierre Nora cautions that embedded within the concept of memory is that of forgetting, paradoxically both the nemesis and the motivating force of memory.⁴¹⁸ His project signals also another quality of memory; namely, that meaning is achieved by memory and does not exist independently of it. As Henri Bergson stated almost a century earlier, "there is no consciousness without memory Inner duration is the continuous life of a memory which prolongs the past into the present Without this survival of the past into the present there would be no duration, but only instantaneity."⁴¹⁹

The process is neither automatic nor simple, however. As Ernst Cassirer cautions, "[i]t is not enough to pick up isolated data of our past experience; we must really *re-collect* them. . . ."⁴²⁰ Cassirer further developed the point: "In man we cannot describe recollection as a simple return of an event, as a faint image or copy of further impressions. It is not simply a repetition but rather a rebirth of the past; it implies a creative and constructive process."⁴²¹ The formation of memory is akin to the process by which knowledge is attained inasmuch as all knowledge, like memory, is symbolic in nature.⁴²²

Recollections and reconstructions of past moments are situated within the limitations not just of selective hindsight and loss of memory, but also of the language through which they are articulated.⁴²³ The bonds of language are further magnified where legal history is concerned, as are the consequent dilemmas of interpretation, because of law's incarnations *qua* text, either by governmental enactment or other transmutation into writing. As Jean Carbonnier put it in an essay analyzing France's civil code, "from the unifier of texts to the unifier of people, there is but one step."⁴²⁴

Language was still further implicated in the totalitarian régimes of the twentieth century, including both France and Germany during the periods discussed above. The philosopher of language George Steiner has ruminated on potential links between the abuse of language under Hitler and Stalin, and the phenomenon he has described as the death of language, in the senses and with the connotations the concept of language traditionally

417. ARENDT, *LIFE OF THE MIND*, *supra* note 50, at 115 (quoting PLATO, PHAEDRUS). For the idea of commemorative constructions as destructive of history, see JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 5 (1993).

418. "*La mémoire . . . ne s'oppose pas à l'oubli . . .*" NORA, *supra* note 19, at 16.

419. BERGSON, *supra* note 2, at 45.

420. CASSIRER, *ESSAY ON MAN*, *supra* note 409, at 51 (emphasis in original).

421. *Id.*; cf. GEORGE STEINER & ANTOINE SPIRE, *BARBARIE DE L'IGNORANCE* 21 (2000) ("Recall is also analysis" ["*Le rappel est aussi une analyse*"]).

422. See CASSIRER, *supra* note 409, at 57.

423. Cf. Starobinski, *supra* note 48, at 2009 ("*l'éloquence . . . façonne les consciences*").

424. Carbonnier, *supra* note 19, at 1342 ("*[d]u rassembleur de textes au rassembleur d'hommes, il n'y a qu'un pas*").

has had.⁴²⁵ In a similar vein, Stolleis has referred to the Nazi legal period as a “tornado that swept up all public language,”⁴²⁶ and Hermann Kantorowicz, after his exile following Hitler’s takeover, characterized language as “the most dangerous enemy of science . . . that unfaithful servant and secret master of thought”⁴²⁷ Jean Clair described Nazism as “first and foremost [an] enormous lie at the heart of language.”⁴²⁸

This problem was signaled long before our time. According to Plato, “no one who possesses the true faculty of thinking . . . and therefore knows the weakness of words, will ever risk framing thoughts in discourse, let alone fix them in so inflexible a form as that of written letters.”⁴²⁹ Cassirer described the problem in terms of “the dependence of relational thought upon symbolic thought,”⁴³⁰ noting the dual nature of “symbol[s] [as] not only universal but extremely variable.”⁴³¹

Contemporary French intellectuals Boris Cyrulnik and Edgar Morin describe the moment of access to language symbols as the “second birth” of each individual.⁴³² The significance of this concept lies in the human-wide destiny “to live in a world of virtuality, thanks to our words,”⁴³³ a condition that privileges the *representation* of ideas effected through and necessitated by language, over the event in nature:

[F]rom the instant when one becomes able to inhabit the world of virtuality - which one invents with one’s narratives - one easily can hate each other and logically wish to kill each other based on the idea one forms of the other, rather than on the knowledge one has of the other. At that moment, one escapes the regulating mechanisms of nature and becomes completely subjected to the world one creates. And it then becomes both quintessentially moral and logical to construct and constitute genocides.⁴³⁴

425. See GEORGE STEINER, *LANGUAGE AND SILENCE* (1967); see also STEINER & SPIRE, *supra* note 421, at 30 (“*Le génie de la rhétorique de Hitler, c’est la mort de notre langage*” [“The genius of Hitler’s rhetoric was the death of our language”]); FAYE, *supra* note 78; VICTOR KLEMPERER, *LTI: LINGUA TERTII IMPERII: NOTIZBUCH EINES PHILOLOGEN* (1995); HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* (1973). An analogous concern with the corruption of language was expressed in the eighteenth century by d’Alembert in *Essai sur la société des gens de lettres et les grands* (1752) (cited in Starobinski, *supra* note 48, at 2034) (abuse of language both a consequence and a cause of moral decadence).

426. STOLLEIS, *supra* note 39, at 45.

427. KANTOROWICZ, *THE DEFINITION OF LAW*, *supra* note 287, at 1. This book was posthumously published by Kantorowicz’s Cambridge University colleagues from the manuscript he had only begun to write when he died prematurely. Kantorowicz had hoped to write a comprehensive account of his legal philosophy.

428. CLAIR, *supra* note 139, at 54 (“[l]e nazisme aurait d’abord été cet énorme mensonge au cœur du langage. . .”).

429. PLATO, *SEVENTH LETTER*, 341 b-343a, *paraphrased in* ARENDT, *LIFE OF THE MIND*, *supra* note 15, at 115.

430. CASSIRER, *ESSAY ON MAN*, *supra* note 409, at 38.

431. *Id.* at 36.

432. See CYRULNIK & MORIN, *supra* note 403, at 19 (citing French twentieth-century poet Paul Valéry for the term and idea of “speech birth” [“*la naissance parolière*”]).

433. *Id.* at 27.

434. *Id.* (“dès l’instant où l’on devient capable de d’habiter le monde virtuel - qu’on invente avec nos récits - on peut très bien se haïr et désirer logiquement se tuer, pour l’idée qu’on se fait de l’autre et non pas pour la connaissance que l’on en a. À cet instant, on échappe aux mécanismes régulateurs de la nature et l’on devient complètement soumis au

[I]deas . . . the necessary means for communicating with reality - also will disguise reality and will cause us to mistake the idea for the reality. This barbarous relationship to ideas is one of the greatest atrocities to have befallen humanity [T]he principal organ of vision is thought. We see with our ideas Our eyes often obey our thought more than our thought obeys our eyes.⁴³⁵

In these lines, Cyrulnik and Morin note the tragic and dangerous aspect of the dominance of the symbolic in human thought and action, but they also understand the role of representation simultaneously as a tremendous force of enablement and beauty.⁴³⁶ On the dependence of understanding on representation, Cyrulnik and Morin echo Goethe's insight that he could not perceive that which he had not depicted.⁴³⁷ The symbol is severed from the symbolized, the representation from the represented, and the word from the subject. Much of postmodernism emanates from the consciousness of the rupture between word and subject, prefigured by, among others, Heidegger, who has been described as having effected the "disappearance of . . . the essentialization of the subject."⁴³⁸

The issues discussed above extend beyond the courts of law whose methodologies and substantive results have been the principal focus of this article. They concern all members of society, even those who do not knowingly contribute to legal theory or practice. Europe's experience with the massive measure of suffering imposed by so many victimizers on so many victims in the name of fascism, stands as a testament to the fact that, unwittingly or not, each individual becomes part of the fabric of law, just as law is a part of the fabric of life. In the final analysis, as Holmes put it, "[t]he law is the witness and external deposit of our moral life."⁴³⁹ In the extinc-

monde qu'on crée. Et c'est alors le plus moralement et le plus logiquement du monde, qu'on fabrique et constitue des génocides."

435. *Id.* at 29 ("les idées - qui sont désormais nos intermédiaires nécessaires pour communiquer avec la réalité - vont aussi masquer la réalité et nous faire prendre l'idée pour le réel. Ce rapport barbare avec les idées est l'une des plus atroces choses qui soient arrivées à l'humanité . . . le principal organe de la vision, c'est la pensée. On voit avec nos idées Les yeux obéissent souvent à nos esprits plus que nos esprits à nos yeux.").

436. *See id.* This latter appreciation emerges with still greater force in Cyrulnik's more recent book, *Les vilains petits canards*, in which he analyzes the power of representation through language, and the narratives one creates, to assist in psychological recovery from trauma. BORIS CYRULNIK, *LES VILAINS PETITS CANARDS* (2001).

437. "Was ich nicht gezeichnet habe, habe ich nicht gesehen," quoted in CLAIR, *supra* note 139, at 30.

438. Antoine Spire, in STEINER & SPIRE, *supra* note 421, at 52 ("Heidegger réalise . . . la disparition de . . . l'essentialisation du sujet"). Spire's description of Heidegger is highly critical. In my view, Heidegger was not responsible for that rupture; he called attention to it. Cyrulnik's insights may well have derived from Heidegger, at least indirectly, inasmuch as Cyrulnik frequently cites with approval Sartre, whose work bears Heidegger's influence. *See* Cyrulnik, *supra* note 436. Compare George Steiner's depiction of the "Heideggerian mystique" as being that we do not speak language, but "language speaks us." In the original French, the phrase "language speaks us" also translates as "language speaks to us" ("le langage nous parle"). *See* Steiner, in JAHANBEGLOO, *supra* note 31, at 165.

439. Holmes, *Path of the Law*, *supra* note 24, at 459; cf. CASSIRER, *ESSAY ON MAN*, *supra* note 409, at 63 ("The nature of man is written in capital letters in the nature of the state.").

tion of methodological pluralism in law, as, I believe, in the extinction of languages, is the threat of intellectual impoverishment, just as in their proliferation is the threat of incommunicability. At the extreme end of pluralism lie chaos, disharmony and paralysis. On the other hand, the European fascist experience suggests that if the loss of pluralism in legal methodology is part of an increasing, perhaps even inexorable, motion towards uniformization, it may entail sacrifice in a plenitude of vision that depends on diversity, and that may be extinguished irretrievably in its absence. Paradoxically, pluralism may be indispensable not just for cultural autonomy and diversity, but also for achieving an integrative, inclusive unification that encourages human independence, freedom and individuality, and that can continue to inspire citizens to have confidence that their political and legal structures are worth preserving, developing and vigilantly safeguarding.

To keep in our minds an understanding of the past that does not hinge on unwarranted associations and conclusions is a first step, but it also is an objective that will need to be renewed with each look backwards. The struggle that lies ahead in the United States, the European Union and elsewhere, is to oversee ongoing developments and structurings of law's theories, practices and meanings as we progress into the future in legal cultures that cannot stand still, and that inevitably, often imperceptibly, will be besieged from within and from without in ways that challenge each generation's capacities of discernment and understanding, and that require each generation to reformulate law for ever-changing contexts.

The examination of judicial methodology in the period of European fascism, and of perceptions of methodology's valence in the era that followed fascism, illuminates some of the challenges law poses to social equilibrium and to justice. As we have seen, one temptation is to view law, including legal methodology, in a vacuum, facilitating apparent logical rigor in analysis, but necessarily relying on a false assumption of stasis. If there is any law that governs law, it is, rather, a law of metamorphosis.⁴⁴⁰

Of the legal theorists I have read, Hermann Kantorowicz perhaps most fully appreciated this principle, and one might say that he developed free law theory from its implications.⁴⁴¹ Metamorphosis is a most uncomforta-

440. The term is Cassirer's. He uses it to describe the internal logic of myths. See CASSIRER, *ESSAY ON MAN*, *supra* note 409, at 81.

441. Kantorowicz's overall theory seems to me to have found an echo in recent years in the ideas of Emmanuel Levinas, who was not a legal scholar and who may not have read Kantorowicz. Levinas advocated the use of general legal categories, but attenuated by equitable flexibility, and in particular stressed the need for state functionaries such as judges to attend to the human face of the individuals they affect, to the face of the "Other," which, in Levinas' theory, is the trigger and foundation of ethics. See EMMANUEL LEVINAS, *ON THINKING-OF-THE-OTHER: ENTRE NOUS* 204 (Michael B. Smith & Barbara Harshav trans., 1998). Remarkable about Levinas' analysis of the significance of the Other is the extent to which it reads like an almost exact replica in reverse of Carl Schmitt's analysis of the Other as the enemy. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 1996) (published in German in 1932, thus before Hitler's accession to power), in which Schmitt defines the "different" as the "enemy," *id.*

ble element to incorporate into judicial methodology, however, because it threatens law's potential for objectivity and neutrality, as well as the legal theorist's potential for achieving reliably accurate conclusions. Nevertheless, the degeneration of law in the period of European fascism suggests that a vital task for legal theory and judicial methodology is to fashion the future in accordance with the premise of metamorphosis, and to remain alert to the danger of failing to recognize and reckon with its contemporaneous manifestations.

at 27, thereby rendering legitimate "the real possibility of killing." *Id.* at 33. For Levinas, the "Other" is almost the exact opposite: it is that which speaks to our altruism, commanding and deserving protection and self-sacrifice. See LEVINAS, *supra*.

